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DATO' SRI MOHD NAJIB HJ ABDUL RAZAK v. PP

FEDERAL COURT, PUTRAJAYA
ABDUL RAHMAN SEBLI CJ (SABAH & SARAWAK)
VERNON ONG LAM KIAT FCJ
RHODZARIAH BUJANG FCJ
B NORDIN HASSAN FCJ
ABU BAKAR JAIS JCA
[CRIMINAL APPLICATION NO: 05(RJ)-11-09-2022(W)]
31 MARCH 2023
[2023] CLJ (JT7)

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Abstract – *Although the Federal Court is clothed with the jurisdiction to review its decision, this power is only exercised in very exceptional circumstances and limited grounds or rarest of rare cases. The power under r. 137 of the Rules of the Federal Court 1995 cannot be invoked,* D *inter alia, to review a decision on its merits which includes the findings of fact or an interpretation of the law. Under no circumstances should the Federal Court position itself as if it were hearing an appeal and decide the case as such. This stringent requirement and high threshold for the invocation of the Federal Court's review powers is in consonance with the* E *fundamental principle that there should be finality in litigation.*

CIVIL PROCEDURE: *Review – Decision – Application to Federal Court to review decision of earlier panel – Applicant tried and convicted on seven charges at High Court for offences under Malaysian Anti-Corruption Commission Act 2009, Penal Code and Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of* F *Unlawful Activities Act 2001 – Applicant sentenced to 12 years' imprisonment and fine of RM210 million, in default five years' imprisonment – Appeals to Court of Appeal and Federal Court dismissed – Whether there existed elements of conflict of interest, bias, miscarriage of justice and prejudice – Rules of the Federal Court 1995,* G *r. 137*

The applicant was tried and convicted on seven charges, at the High Court, for offences under the Malaysian Anti-Corruption Commission Act 2009, the Penal Code and the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001. He was sentenced to 12 years' H imprisonment and a fine of RM210 million, in default five years' imprisonment. The applicant was unsuccessful in his appeals to the Court of Appeal and the Federal Court; his convictions and sentence were affirmed. Hence, the present application, pursuant to r. 137 of the Rules of the Federal Court 1995 ('RFC') to review the decisions of the Federal Court in: I (i) dismissing the applicant's application to adduce additional evidence and for the disqualification of the trial judge who convicted and sentenced the applicant in the SRC case. The applicant had intended to adduce fresh evidence to show that there was a miscarriage of justice, conflict of interests

and bias in the SRC trial as the trial judge failed to disclose his role and involvement in the SRC; (ii) refusing to grant an adjournment of the hearing of the main appeals requested by the applicant. According to the applicant, the refusal had occasioned a serious miscarriage of justice and caused prejudice to the applicant as the newly-retained counsel for the applicant was not prepared to argue the main appeal; (iii) dismissing the applicant's application to recuse the Chief Justice ('CJ') from hearing the main appeal of the SRC case. This application was premised upon two grounds, namely: (a) the CJ's husband had, in 2018, posted a posting on his Facebook account, expressing negative sentiments towards the applicant which would influence the CJ's decision in the appeal; and (b) the CJ had expressed no objection for members of the Malaysian Bar to apply for adjournments to attend the 'Walk for Justice' in 2022 in opposing the investigation against the trial judge in the SRC case; and (iv) dismissing the applicant's main appeal of the SRC case. On this point, the applicant essentially argued that the judgment on the main appeal was not a reasoned or speaking judgment.

Held (dismissing application)
Per Vernon Ong Lam Kiat, Rhodzariah Bujang, Nordin Hassan FCJJ, Abu Bakar Jais JCA (for the majority):

(1) Both parties had submitted on the application to adduce fresh evidence by the applicant and the Federal Court decided that the applicant failed to fulfil the threshold under s. 93(1) of the Courts of Judicature Act 1964 and after having considered the required elements laid down in *R v. Parks* and *Ladd v. Marshall*. The decision was based on the assessment of the evidence by the Federal Court and the charges preferred against the applicant. The Federal Court had found that the additional evidence sought to be introduced by the applicant (i) failed to disclose any conflict of interest or bias on the part of the trial judge; and (ii) had no relevance to the charges faced by the applicant in the SRC trial. The Federal Court's decision was based on merits and the application of law. (paras 11-13)

(2) In refusing to allow the adjournment sought by the applicant, the Federal Court took into consideration that: (i) the hearing dates of the appeals had been fixed four months earlier with the consent of both parties; and (ii) the applicant's counsel had been informed, verbally and in writing, and in no uncertain terms that there would be no adjournment of the hearing of the appeals. Further, the appeal records were made available to the new solicitor when the same were uploaded onto the shared dropbox folder. In addition, the Federal Court also considered Arahan Amalan Ketua Hakim Negara 2/2003 which required the court to prioritise public interest cases. The Federal Court then took the view that there were no cogent reasons for the adjournment and that, when the applicant discharged his former counsel, the new counsel who took over conduct of the appeals was duty-bound to proceed with the hearing. As

such, the Federal Court had exercised its discretion in not granting the adjournment. There was no cogent evidence to support the applicant's assertion that the earlier panel of this court had failed to exercise its discretion judiciously. Counsel for the applicant was, in fact, given the right to be heard by the Federal Court but refused to avail himself of the opportunities given by the court. (paras 20, 21 & 33)

(3) The CJ, in Her Ladyship's grounds of judgment on recusal, had identified and applied the correct test to the facts. The decision of the CJ not to recuse Her Ladyship's self from hearing the appeal was also supported by the other panel members of the Federal Court who came up with a joint supporting decision. There was no basis for this court to review the recusal decision. (paras 44 & 45)

(4) The pronouncement on 23 August 2022 was a judgment of the Federal Court, which unequivocally decided on the points in issue before it, including the 94 grounds of appeal. The applicant's argument, that it was not a speaking judgment as it was unsupported by reasons, was preposterous. Any view to the contrary, as to the efficacy of that judgment, would lay open the door similar to contentions in relation to decisions of this court and indeed of other courts as well as in matters where brief oral judgments are delivered at the conclusion of argument. (para 52)

Per Abdul Rahman Sebli CJ (Sabah & Sarawak) (dissenting):

(1) The reason why the applicant's counsel discharged himself from representing the applicant was because he was totally unprepared to argue the main appeals, which involved some 30,000 documents to go through. In that situation, an adjournment would have been in order to enable the applicant to engage another counsel or, alternatively, give his counsel sufficient time to prepare for the main appeals, bearing in mind the application for adjournment was not to scuttle the hearing of the main appeals. It was done in good faith by a lawyer who had just been retained three weeks earlier to represent the applicant. (paras 96 & 139)

(2) The applicant's right to a fair hearing was altogether defeated when the court decided to go ahead with the hearing of the main appeals in spite of the fact that he was not legally represented after his counsel had discharged himself. The fact that counsel remained in court did not change the equation as the applicant was still without legal representation in the real sense of the word as counsel refused to take further part in the proceedings. This warranted a setting aside of the decision by way of a review under r. 137 of the RFC for the reason that it had caused injustice to the applicant for which he had no other effective remedy. The proper order would be an order of acquittal and discharge for all the offences that the applicant was charged with. (paras 139, 166 & 174)

Bahasa Malaysia *Headnotes*

Pemohon dibicarakan dan disabitkan atas tujuh pertuduhan, di Mahkamah Tinggi, untuk kesalahan-kesalahan bawah Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009, Kanun Keseksaan dan Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram 2001. Beliau dijatuhkan hukuman penjara 12 tahun dan denda RM210 juta, jika gagal penjara lima tahun. Pemohon tidak berjaya dalam rayuan beliau ke Mahkamah Rayuan dan Mahkamah Persekutuan; sabitan dan hukuman beliau disahkan. Maka timbul permohonan ini, bawah k. 137 Kaedah-kaedah Mahkamah Persekutuan 1995 ('KKMP') untuk menyemak keputusan-keputusan Mahkamah Persekutuan dalam: (i) menolak permohonan pemohon untuk mengemukakan keterangan tambahan dan untuk melucutkan kelayakan hakim bicara yang mensabitkan dan menjatuhkan hukuman atas pemohon dalam kes SRC. Pemohon ingin mengemukakan keterangan baharu untuk menunjukkan terdapat kesilapan mahkamah, konflik kepentingan dan berat sebelah dalam perbicaraan SRC kerana hakim bicara gagal mendedahkan peranan dan keterlibatan beliau dalam SRC; (ii) keengganan memberi penangguhan pendengaran rayuan-rayuan utama yang dipohon oleh pemohon. Menurut pemohon, keengganan tersebut menyebabkan kesilapan serius mahkamah dan menyebabkan prejudis terhadap pemohon kerana peguam yang baru dilantik oleh pemohon tidak bersedia untuk berhujah semasa rayuan utama; (iii) menolak permohonan pemohon agar Ketua Hakim Negara ('KHN') menarik diri daripada mendengar rayuan utama dalam kes SRC. Permohonan ini berkisarkan dua asas iaitu: (a) suami KHN telah, pada 2018, membuat kiriman di akaun Facebook miliknya, menzahirkan sentimen-sentimen negatif terhadap permohon yang akan mempengaruhi keputusan KHN dalam rayuan tersebut; dan (b) KHN tidak menyuarakan apa-apa bantahan apabila ahli-ahli Majlis Peguam Negara memohon penangguhan untuk menghadiri 'Walk for Justice' pada 2022 demi membantah siasatan terhadap hakim bicara dalam kes SRC; dan (iv) menolak rayuan utama pemohon dalam kes SRC. Bersangkutan hujahan ini, pemohon asasnya mendalihkan bahawa penghakiman dalam rayuan utama adalah penghakiman tidak beralasan atau 'speaking judgment'.

Diputuskan (menolak permohonan)
Oleh Vernon Ong Lam Kiat, Rhodzariah Bujang, Nordin Hassan HHMP, Abu Bakar Jais HMR (penghakiman majoriti):

(1) Kedua-dua belah pihak telah membentangkan hujah masing-masing tentang permohonan pemohon untuk mengemukakan keterangan baharu dan Mahkamah Persekutuan telah memutuskan bahawa pemohon gagal memenuhi ambang bawah s. 93(1) Akta Mahkamah Kehakiman 1964 dan selepas mempertimbangkan elemen-elemen yang dikehendaki seperti yang digariskan bawah *R v. Parks* dan *Ladd v. Marshall*. Keputusan

tersebut adalah berdasarkan penilaian keterangan oleh Mahkamah Persekutuan dan pertuduhan-pertuduhan yang dipertuduh terhadap pemohon. Mahkamah Persekutuan mendapati bahawa keterangan tambahan yang pemohon ingin kemukakan (i) gagal mendedahkan apa-apa konflik kepentingan atau berat sebelah hakim bicara; dan (ii) tidak relevan dengan pertuduhan-pertuduhan yang dihadapi oleh pemohon dalam perbicaraan SRC. Keputusan Mahkamah Persekutuan adalah berdasarkan merit dan pemakaian undang-undang.

(2) Dalam menolak penangguhan yang dipohon oleh pemohon, Mahkamah Persekutuan mengambil kira bahawa: (i) tarikh-tarikh pendengaran telah ditetapkan empat bulan terdahulu dengan kebenaran kedua-dua pihak; dan (ii) peguam pemohon telah dimaklumkan, secara lisan dan bertulis, dan dengan syarat-syarat yang jelas bahawa tidak akan ada penangguhan pendengaran rayuan-rayuan. Selanjutnya, rekod-rekod rayuan tersedia buat peguam baharu kerana kesemuanya telah dimuat turun dalam fail *dropbox* berkongsi. Tambahan lagi, Mahkamah Persekutuan juga mempertimbangkan Arahan Amalan Ketua Hakim Negara 2/2003 yang berkehendakkan agar mahkamah mengutamakan kes-kes kepentingan awam. Mahkamah Persekutuan seterusnya berpendapat bahawa tiada alasan kukuh untuk penangguhan dan, apabila pemohon menamatkan perkhidmatan peguam beliau, peguam baharu yang mengambil alih perjalanan rayuan menggalas tanggungjawab meneruskan pendengaran. Oleh itu, Mahkamah Persekutuan telah menjalankan budi bicaranya dalam tidak membenarkan penangguhan. Tiada alasan kukuh yang menyokong tegasan pemohon bahawa panel terdahulu mahkamah ini gagal menjalankan budi bicaranya secara kehakiman. Hakikatnya, peguam pemohon telah diberi peluang didengar oleh Mahkamah Persekutuan tetapi beliau enggan menggunakan peluang-peluang yang diberi oleh mahkamah.

(3) Ketua Hakim Negara, dalam alasan penghakiman beliau, telah mengenal pasti dan mengguna pakai ujian yang betul terhadap fakta. Keputusan KHN untuk tidak menarik diri beliau daripada mendengar rayuan juga disokong oleh lain-lain ahli panel Mahkamah Persekutuan yang mengutarakan keputusan bersama yang menyokong. Tiada asas untuk mahkamah ini menyemak keputusan bersangkutan penarikan diri.

(4) Pengumuman pada 23 Ogos 2022 adalah penghakiman Mahkamah Persekutuan, yang jelas memutuskan tentang hujahan-hujahan dalam isu-isu yang dikemukakan, termasuk 94 alasan rayuan. Hujahan pemohon, bahawa penghakiman tersebut bukan 'speaking judgment' kerana tidak disokong oleh alasan-alasan, adalah tidak munasabah. Apa-apa pandangan bertentangan, tentang keberkesanan penghakiman tersebut, akan membuka ruang buat dakwaan-dakwaan serupa tentang keputusan-keputusan mahkamah ini dan juga lain-lain mahkamah berkenaan penghakiman lisan yang ringkas yang disampaikan pada penutup hujahan.

Abdul Rahman Sebli HB (Sabah & Sarawak) (menentang):

(1) Sebab peguam pemohon menarik diri daripada mewakili pemohon adalah kerana beliau langsung tidak bersedia untuk berhujah dalam rayuan-rayuan utama, yang melibatkan 30,000 dokumen untuk diteliti. Dalam situasi sedemikian, satu penangguhan adalah sesuai untuk membolehkan pemohon melantik peguam lain atau, secara alternatifnya, memberi peguam beliau masa yang cukup untuk menyediakan rayuan-rayuan utama, dengan beringat bahawa permohonan penangguhan bukanlah untuk melubangtenggelamkan pendengaran rayuan-rayuan utama. Permohonan dibuat dengan suci hati oleh seorang peguam yang baru dilantik selama tiga minggu untuk mewakili pemohon.

(2) Hak pemohon terhadap pendengaran yang adil sama sekali lesap apabila mahkamah memutuskan untuk meneruskan dengan pendengaran rayuan-rayuan utama walaupun beliau tidak diwakili secara guaman selepas peguam beliau menarik diri. Fakta bahawa peguam kekal dalam mahkamah tidak mengubah keadaan kerana pemohon masih tidak berwakilkan peguam dalam erti kata harfiah perkataan tersebut kerana peguam enggan mengambil bahagian lanjut dalam prosiding. Ini mewajarkan pengetepian keputusan melalui semakan bawah k. 137 KKMP kerana telah menyebabkan ketidakadilan terhadap pemohon kerana dia tidak punyai remedi efektif lain. Perintah yang sesuai adalah perintah pelepasan dan pembebasan terhadap kesemua kesalahan yang pemohon dipertuduhkan.

Case(s) referred to:

Adorna Properties Sdn Bhd v. Kobchai Sosothikul [2005] 1 CLJ 565 FC ***(refd)***

Alma Nudo Atenza v. PP & Another Appeal [2019] 5 CLJ 780 FC ***(refd)***

Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd [2008] 6 CLJ 1 FC ***(refd)***

Awaluddin Suratman & Ors v. PP [1991] 3 CLJ 2459; [1991] 2 CLJ (Rep) 310 HC ***(refd)***

Bremer Vulcan Schiffbau And Maschinenfabrik v. South India Shipping Corp [1981] 1 All ER 289 ***(refd)***

Busing Jali & Ors v. Kerajaan Negeri Sarawak & Anor And Other Appeals [2022] 3 CLJ 1 FC ***(refd)***

Chan Yock Cher v. Chan Teong Peng [2005] 4 CLJ 29 FC ***(refd)***

Dato' See Teow Chuan & Ors v. Ooi Woon Chee & Ors And Another Appeal [2013] 4 CLJ 901 FC ***(refd)***

Dato' Seri Anwar Ibrahim v. PP [2004] 4 CLJ 157 FC ***(refd)***

Dato' Sri Mohd Najib Hj Abd Razak v. PP & Other Appeals (No 4) [2022] 8 CLJ 393 FC ***(refd)***

Dato' Sri Mohd Najib Hj Abdul Razak v. PP And Other Appeals (No 2) [2022] 8 CLJ 378 FC ***(refd)***

Datuk Seri Anwar Ibrahim v. Government Of Malaysia & Anor [2021] 6 CLJ 1 FC ***(refd)***

A *Dick v. Piller [1943] AC 627* ***(refd)***
Dietrich v. R [1993] 3 LRC 272 ***(refd)***
DPP v. Majewski [1977] AC 443 ***(refd)***
Elliot v. R (2007) 234 CLR 38 ***(refd)***
Express Newspapers Plc v. News (UK) Ltd [1990] 1 WLR 1320 ***(refd)***
Fong Kong Meng & Anor v. PP [2019] 9 CLJ 301 FC ***(refd)***
B *Halaman Perdana Sdn Bhd & Ors v. Tasik Bayangan Sdn Bhd [2014] 3 CLJ 681 FC* ***(refd)***
Hong Yik Plastics (M) Sdn Bhd v. Ho Shen Lee (M) Sdn Bhd & Anor [2020] 4 CLJ 479 CA ***(refd)***
Hup San Timber Trading Co Sdn Bhd v. Tan Ah Lan [1978] 1 LNS 66 FC ***(refd)***
Ishak Hj Shaari v. PP [2006] 2 CLJ 325 CA ***(refd)***
C *Kerajaan Malaysia v. Semantan Estates (1952) Sdn Bhd [2019] 2 CLJ 145 FC* ***(refd)***
Kho Jabing v. PP [2016] SGCA 36 ***(refd)***
Kiew Foo Mui & Ors v. PP [1996] 1 CLJ 14 SC ***(refd)***
Ladd v. Marshall [1954] 3 All ER 745 ***(refd)***
Lai Cheng Chong v. PP [1993] 1 LNS 33 HC ***(refd)***
Lee Ah Tee v. Ong Tiow Pheng & Ors [1984] 1 CLJ 26; [1984] 1 CLJ (Rep) 187 FC ***(refd)***
D *Lumley v. Wagner [1843-60] All ER Rep 368* ***(refd)***
Lumley v. Wagner [1852] EWHC (Ch) J 96 ***(refd)***
Maxwell v. Keun And Others [1926] 1 KB 645 ***(refd)***
Mohanlal Gordhandas Sheth v. Ban Guan & Co [1955] 1 LNS 74 HC ***(refd)***
Monteiro v. PP [1964] 1 LNS 115 HC ***(refd)***
N Jrishna Murthy, Accused v. Abdul Sabban And Another 1964 KAR 102 ***(refd)***
E *Pertama Cabaret Nite Club Sdn Bhd v. Roman Tam [1981] 1 LNS 235 FC* ***(refd)***
Powell v. Alabama (1932) 287 US 68 ***(refd)***
PP v. Ishak Hj Shaari & Other Appeals [2003] 3 CLJ 843 CA ***(refd)***
PP v. Tengku Adnan Tengku Mansor [2020] 9 CLJ 30 FC ***(refd)***
R v. De May [2005] NZCA ***(refd)***
R v. Horseferry Riad Magistrates' Court, ex p Bennet [1994] 1 AC 4 ***(refd)***
F *R v. Maughan [2004] NICA 21* ***(refd)***
R v. Parks [1961] 3 All ER 633 ***(refd)***
R v. Smith [2003] 3 NZLR 617 ***(refd)***
R v. Thames Magistrates' Court, ex parte Polemis [1972] 2 All ER 1219 ***(refd)***
R v. Trotta [2007] 3 SCR 453 ***(refd)***
Raja Petra Raja Kamarudin v. Menteri Dalam Negeri [2010] 4 CLJ 25 FC ***(dist)***
G *Sankar v. The State [1994] UKPC 1* ***(refd)***
See Teow Koon v. Kian Joo Can Factory Bhd & Ors [2022] MLJU 3546 ***(refd)***
Shamsiah Ahmad Sham v. Public Services Commission, Malaysia & Anor [1991] 1 CLJ 23; [1991] 1 CLJ (Rep) 419 SC ***(refd)***
State (Healy) v. Donoghue [1976] IR 325 ***(refd)***
Strickland v. Washington (1984) 466 US 668 ***(refd)***
H *TR Sandah Tabau & Ors v. Director Of Forest, Sarawak & Anor And Other Applications [2019] 10 CLJ 436 FC* ***(refd)***
Tunde Apatira & Ors v. PP [2001] 1 CLJ 381 FC ***(refd)***
United States v. Gonzalez-Lopez (2006) 548 US 140 ***(refd)***
Yahya Hussein Mohsen Abdulrab v. PP [2021] 9 CLJ 414 FC ***(refd)***

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Legislation referred to:

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, s. 4(1)(b)
Courts of Judicature Act 1964, ss. 74, 93(1)
Criminal Procedure Code, s. 313(1), (2)
Federal Constitution, art. 5(1)
Legal Profession (Practice and Etiquette) Rules 1978, rr. 6(a), 24(a), (b)
Malaysian Anti-Corruption Commission Act 2009, s. 23
Penal Code, s. 409
Rules of Court 2012, O. 64
Rules of the Federal Court 1995, r. 137

For the appellant - Muhammad Shafee Abdullah, Tania Scivetti, Sarah Abishegam, Muhammad Farhan Shafee, Wan Mohammad Arfan Wan Othman, Alaistair Brandah Norman, Genevieve Vanniashingham & Umi Nafesah Mohd Noor; M/s Shafee & Co

For the respondent - V Sithambaram, Donald Joseph Franklin, Sulaiman Kho Kheng Fuei, Mohd Ashrof Adrin Kamarul & Manjira Vasudeva; DPPs

Reported by Najib Tamby

JUDGMENT

Vernon Ong Lam Kiat, Rhodzariah Bujang, Nordin Hassan FCJJ, Abu Bakar Jais JCA (for the majority):

[1] The applicant, Dato' Sri Mohd Najib bin Hj Abdul Razak, was tried and convicted on seven charges in the High Court. He was sentenced to an aggregate concurrent term of imprisonment of 12 years and a fine of RM210 million, in default five years imprisonment. His appeals to the Court of Appeal against his convictions and sentence were dismissed. He then appealed to this court. His appeals to this court were dismissed and his convictions and sentence affirmed. The applicant who was dissatisfied with the decisions of this court filed an application under r. 137 of the Rules of the Federal Court 1995 to review four decisions of the Federal Court. The four decisions are as follows:

(i) the decision on 16 August 2022, dismissing the applicant's application to adduce additional evidence and the disqualification of Justice Mohd Nazlan, the trial judge who convicted and sentenced the applicant in the SRC case;

(ii) the decision on 16 August 2022, refusing to grant an adjournment of the hearing of the main appeals requested by the applicant's counsel;

(iii) the decision on 23 August 2022, dismissing the applicant's application to recuse the Chief Justice ('the CJ') from hearing the main appeal of the SRC case; and

(iv) the decision on 23 August 2022, dismissing the applicant's main appeal of the SRC case.

[2] We have read the cause papers and written submissions and heard the oral submissions by both parties. Considering the law and the facts in the present case, our analysis and decision are as follows.

The Law

[3] Before we proceed to decide on the merits of the applicant's review application, it is instructive to recapitulate the law in a review application under r. 137. Rule 137 states:

> For the removal of doubts, it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to hear any application or to make any order as may be **necessary to prevent injustice** or **to prevent an abuse of the process of the Court**.
>
> (emphasis added)

[4] It is also a settled principle of law that, although the Federal Court is clothed with the jurisdiction to review its decision, this power is only exercised in very exceptional circumstances and limited grounds or rarest of rare cases. The power under r. 137 cannot be invoked *inter alia* to review a decision on its merits which includes the findings of fact or interpretation of the law. This stringent requirement and high threshold for the invocation of this court's review powers is consistent with the fundamental principle that there should be finality in litigation; put in another way, that the outcome of litigation should be final.

(See *Fong Kong Meng & Anor v. PP* [2019] 9 CLJ 301 (FC); *Kerajaan Malaysia v. Semantan Estates (1952) Sdn Bhd* [2019] 2 CLJ 145 (FC); *Chan Yock Cher v. Chan Teong Peng* [2005] 4 CLJ 29 (FC); *Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 6 CLJ 1; [2008] MLJU 251; *Dato' See Teow Chuan & Ors v. Ooi Woon Chee & Ors And Another Appeal* [2013] 4 CLJ 901; [2013] 4 MLJ 351 (FC); *TR Sandah Tabau & Ors v. Director Of Forest, Sarawak & Anor And Other Applications* [2019] 10 CLJ 436; *Busing Jali & Ors v. Kerajaan Negeri Sarawak & Anor And Other Appeals* [2022] 3 CLJ 1 (FC); *Dato' Seri Anwar Ibrahim v. PP* [2004] 4 CLJ 157 (FC); *Datuk Seri Anwar Ibrahim v. Government Of Malaysia & Anor* [2021] 6 CLJ 1; [2022] 1 MLJ 1 (FC)).

[5] Essentially, what we have before us is an application for this court to review its own decisions. At the forefront of our minds is that this court is not hearing an appeal from the decision of the Court of Appeal which affirmed the convictions and sentence imposed by the High Court. That, this court has already done and the decisions of this court were delivered on 16 August 2022 and 23 August 2022.

[6] Under no circumstances should this court position itself as if it were hearing an appeal and decide the case as such. In other words, it is not for this court to consider whether the earlier panel of this court had or had not made a correct decision on the facts. That is a matter of opinion. Even on

the issue of law, it is not for this court to determine whether this court had earlier, in the same case, interpreted or applied the law correctly or not. That too is a matter of opinion.

[7] In a review application the court scrutinises the record of proceedings – the official neutral record and no more – to examine the events that took place, to consider all the circumstances, and to see whether it can be said that the applicant has suffered a breach of natural justice, denial of the right to a fair trial, and denial of the right to counsel. It must be reiterated that the court hearing a review application should not go into the merits of the appeal.

[8] The limited circumstances under, which r. 137 may be invoked as envisaged by the authorities among others, are quorum failure which amounts to procedural unfairness, breach of natural justice, or the decision was tainted with bias.

(see *Asean Security*'s case (*supra*), *Dato See Teow Chuan*'s case (*supra*)).

Analysis And Decision

The Decision On 16 August 2022, Dismissing The Applicant's Motion To Adduce Additional Evidence And The Disqualification Of Justice Mohd Nazlan, The Trial Judge Who Convicted And Sentenced The Applicant In The SRC Case

[9] On this issue, the applicant intended to adduce fresh evidence which shows among others, that Justice Mohd Nazlan while working with Maybank was involved in providing advisory services to 1MDB for the setting up of the SRC, was aware of the RM140 million loan from Maybank to Putra Perdana Development where RM42 million later ended up in the applicant's bank account which is the subject matter of the SRC trial and was also aware of the credit facilities of RM4.17 billion from Maybank to 1MDB for the acquisition of Tanjong Energy.

[10] In the circumstances, it was submitted by counsel for the applicant that the fresh evidence was pertinent as it can show that there was a miscarriage of justice in the SRC trial as Justice Mohd Nazlan failed to disclose his role and involvement in the SRC and erred in making the findings that the appellant engineered the formation of the SRC and having control and dominion over SRC. It was contended that there were conflicts of interest and bias on the part of Justice Mohd Nazlan besides being a potential witness, that warranted his disqualification from presiding the SRC trial.

[11] In this regard, we find that both parties had submitted on this application to adduce fresh evidence by the applicant and eventually it was decided by the Federal Court that the applicant has failed to fulfil the threshold under s. 93(1) of the CJA and after having considered the required elements as laid down in *R v. Parks* [1961] 3 All ER 633 and *Ladd v. Marshall*

[1954] 3 All ER 745. That decision was based on the assessment of the evidence by the Federal Court and the charges preferred against the applicant, the Federal Court found that the additional evidence sought to be introduced by the applicant failed to disclose any conflict of interest or bias on the part of Justice Mohd Nazlan.

[12] The Federal Court decision was based on merits and the application of law which we find no room for the invocation of r. 137 to review the said decision.

[13] Further, the applicant was charged with the offence of using his position for his benefit under s. 23 of the MACC Act, criminal breach of trust under s. 409 of the Penal Code, and money laundering under s. 4(1)(b) of AMLATPUA. The Federal Court took the view that there is no relevance of the intended fresh evidence with the charges faced by the applicant in the said SRC trial. Furthermore, as conceded by counsel for the applicant the source of RM42 million was not relevant in an offence of criminal breach of trust. This is reflected in para. 39, grounds of judgment of the Federal Court which states:

> [39] The next point in the argument of the learned counsel for the applicant is that Justice Nazlan knew about the source of the monies when they were allegedly misappropriated by the applicant from SRC International Sdn Bhd. **As conceded by Tuan Haji Hisham in the course of his submission on the motion, it is trite law that in cases involving criminal breach of trust, the source of the misappropriated monies is not relevant** ... (emphasis added)

[14] Thus, we find the applicant's contention on this issue to be untenable.

The Decision On 16 August 2022, Refusing To Grant An Adjournment Of The Hearing Of The Main Appeal Requested By The Applicant's Counsel

[15] Counsel for the applicant submitted that the Federal Court's decision in refusing to allow the adjournment sought by the applicant after the application to adduce further evidence was dismissed had occasioned a serious miscarriage of justice and caused prejudice to the applicant. This was because counsel for the applicant, Hj Hisyam Teh Poh Teik was not prepared to argue the main appeal as he was newly retained as the applicant's counsel. It was further submitted that the prosecution team also did not object to the application for adjournment as requested by counsel for the applicant.

[16] After the adjournment application was refused, counsel for the applicant had applied to discharge himself from representing the applicant but was disallowed by the Federal Court. Thus, it was argued that the applicant was represented by an ineffective counsel and that this infringed the applicant's rights under art. 5 of the Federal Constitution. It was further submitted that the Federal Court's decision in disallowing the applicant's counsel to discharge himself was against the Registrar's Circular 6/1960 and

the decision of the High Court in *Lai Cheng Chong v. PP* [1993] 1 LNS 33; [1993] 3 MLJ 147 as well as the principle laid down in *Lumley v. Wagner* [1852] EWHC (Ch) J 96. In addition, it was argued that the Federal Court has no power to prevent the counsel from discharging as counsel for the applicant.

[17] Thus, counsel for the applicant contended that the applicant was not given the opportunity to submit effectively which caused a miscarriage of justice to the applicant and was against the rule of natural justice. Further, it was submitted that the Federal Court affirmed the sentence imposed against the applicant without hearing the submission by the parties on the sentence.

[18] The law on adjournments is settled. It is this. The court has the absolute discretion in allowing or refusing an application for adjournment. The fact of the prosecution having not raised any objections to the applicant's counsel's application for adjournment is neither here nor there. The court is not bound to adjourn the hearing of a case as a matter of course merely because the other side has no objections. That the grant or refusal of an adjournment is an exercise of discretion of the court was clearly pronounced by this court in *Halaman Perdana Sdn Bhd & Ors v. Tasik Bayangan Sdn Bhd* [2014] 3 CLJ 681:

> [21] As regards the prayer to set aside the first decision, **we are of the view that it was obviously not within the ambit of r. 137. The grant or refusal of an adjournment was entirely an exercise of discretion by the learned judges** who heard the leave application. (emphasis added)

[19] Of course, it goes without saying such discretion should be exercised judiciously. In *KJ Aiyar Judicial Dictionary,* 14th edn defined judicial discretion as follows:

> The *judicial discretion* is the discretion to know through the law what is just. It must be exercised with vigilance and circumspection according to justice, common sense, and sound judgment. (*Sarpanch Lonand Gram Panchayat v. Ramgiri Goswami* AIR 1968 SC 222)
>
> The discretion which the court has to exercise is a judicial discretion. *That discretion has to be exercised on well settled principles. Therefore, the court has to consider the nature of obligation in respect of which performance is sought, circumstances under which the decision came to be made, the conduct of parties, and the effect of the court granting the decree ...* (emphasis added)

[20] We have scrutinised the record of proceedings, including the transcripts of the case management sessions leading up to the hearing of the fresh evidence and recusal applications and the main appeals. In refusing to allow the adjournment sought by counsel for the applicant, the Federal Court took into consideration the following facts: (i) that the hearing dates of the appeals has been fixed four months earlier, (ii) the hearing dates were fixed with the consent of both parties, and (iii) that the applicant's counsel have been informed verbally and in writing and in no uncertain terms that there

will be no adjournment of the hearing of the appeals. Further, the record of appeal was made available to the new solicitor, Messrs Zaid Ibrahim Suflan TH Liew & Partners (ZIST) by 5 July 2022 when the appeal records were uploaded onto the shared dropbox folder. In addition, the Federal Court also considered Arahan Amalan Ketua Hakim Negara 2/2003 which requires the court to prioritise public interest cases. The Federal Court then took the view that there were no cogent reasons for the adjournment and that when the applicant discharged his former counsel, the new counsel who took over conduct of the appeals was duty-bound to proceed with the hearing of the appeal as required under rr. 6(a), 24(a) and 24(b) of the Legal Profession (Practice and Etiquette) Rules 1978. As such, the Federal Court exercised its discretion in not granting the adjournment.

[21] It is abundantly clear to us that the earlier panel of this court had considered all the relevant facts and circumstances before arriving at its decision to refuse the adjournment. There is no cogent evidence to support the applicant's assertion that the earlier panel of this court had failed to exercise its discretion judiciously.

[22] The next pertinent issue here is whether there was any infringement of natural justice or denial of the applicant's rights to a fair trial as the applicant's newly appointed counsel was not afforded the right to submit effectively on the main appeal as he was not prepared and his request for adjournment was refused by the Federal Court.

[23] Before we move to the applicant's main bone of contention, it is useful to recapitulate the concept of natural justice. This concept was explained succinctly by the Supreme Court in *Shamsiah Ahmad Sham v. Public Services Commission, Malaysia & Anor* [1991] 1 CLJ 23; [1991] 1 CLJ (Rep) 419; [1990] 3 MLJ 364 as follows:

> *Natural justice is a concept which involves common law rules, namely, (a) the right to be heard (audi alteram partem): the principle that a decision-maker must afford an opportunity to be heard to a person whose interests will be adversely affected by the decision, and (b) the rule against bias (nemo debet esse judex in propria sua causa): the principle that a decision- maker must be disinterested or unbiased in the matter to be decided*. The classical statement of the fair hearing rule of course comes from the judgment of Lord Loreburn in *Board of Education v. Rice* [1911] AC 179 at p 182:
>
> > ... they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view. (emphasis added)

[24] In this connection, the word "justice" has been explained by this court in *Asean Security*'s case (*supra*), in the following manner: A

> Now, *"justice" is a very wide and general term*. Jurists through the years since Aristotle and Plato have tried to define justice and each has his own definition. It is not necessary for me to delve into that for the purpose of this judgment. *Any party who has lost a case will always claim that there has been injustice against him while the successful party will plead otherwise. In our system, the court's function is to hear and decide to the best of its ability, honestly, and after carefully considering all the evidence adduced before it, makes a decision. Based on its findings and applying the law as the judge understands, he arrives at his conclusion. That to my mind, in the context of this case, is justice*. The decision may not be accepted by the unsuccessful party. But that is the best that an honest and an impartial judge can decide. (emphasis added) B C

[25] Reverting to the present case, the Federal Court explained that the applicant's counsel was invited repeatedly to submit but refused to do so although given some time to prepare. The court then proceeded to hear the submission of the respondent to allow the applicant's counsel time to prepare for his submission. When the applicant's counsel maintained its stand not to submit, the Federal Court proceeded with the appeal in the presence of the applicant and his counsel. Reliance was also placed on s. 313(2) of the CPC which equated the refusal to submit by counsel for the applicant with the words 'not appearing to support' envisaged under the said provision where the court is empowered to proceed with the hearing of the appeals. D E

[26] Section 313 of the CPC states:

> 313. (1) When the appeal comes on for hearing the appellant, if present, shall be first heard in support of the appeal, the respondent, if present, shall be heard against it, and the appellant shall be entitled to reply. F
>
> (2) *If the appellant does not appear to support his appeal the court may consider his appeal and may make such order thereon as it thinks fit*:
>
> > Provided that the court may refuse to consider the appeal or to make any such order in the case of an appellant who is out of the jurisdiction or who does not appear personally before the court in pursuance of a condition upon which he was admitted to bail, except on such terms as it thinks fit to impose. (emphasis added) G

[27] Here, apart from the power under s. 92 of the CJA, the Federal Court had applied the law to the facts before deciding that the court has the power to proceed with the hearing of the appeals. We emphasised again here that the interpretation and application of the law to the facts are matters of opinion and not subject to a review under r. 137 of the Rules of the Federal Court 1995. If a party is dissatisfied with the interpretation and application of the law the matter may be raised in another appeal in a similar case. This is known as 'revisiting'. It should not be taken up in the same case by way of a review. H I

[28] As regards the issue regarding the right to be heard, the record shows that even though counsel for the applicant was given the opportunity to submit on numerous occasions, applicant counsel refused to exercise the rights on the ground that he was not prepared. This excuse was unacceptable as the hearing dates had been fixed much earlier with the consent of both parties. Accordingly, the Federal Court decided that the main appeals should proceed as scheduled.

[29] On these uncontroverted facts, it cannot be said that the applicant's counsel was not given the right to be heard by the Federal Court. It was simply a situation where counsel refused to submit. As such, we find there was no denial of the applicant's right to be heard. In this connection, we refer to a case on point: *Monteiro v. PP* [1964] 1 LNS 115; [1964] 30 MLJ 338, where Ismail Khan J said this:

> *The only ground of appeal against conviction is that the appellant's counsel was never given an opportunity of addressing the court at the close of the cas*e. It would appear from the records that at the close of the case the learned President found the appellant guilty before his counsel could address the court. This was due purely to the inadvertence on the part of the learned President and on his attention being drawn to it, by defence counsel, before sentence was passed he gave the latter the opportunity to make his submissions. *Counsel however said: "I will not make a submission and I leave it to Your Honour*". The learned President then made this finding: 'I find accused guilty of the alternative charge and convict him". He then proceeded to sentence him. At the hearing of this appeal, Mr. Chew for the appellant, who also appeared for him in the lower court, said that the learned President was wrong in finding the appellant guilty without giving him an opportunity of making an address ...
>
> It is clear that when the learned President first made his finding that the appellant was guilty, this finding was not final as the court had not arisen for the day. It was open to the learned President to call on defence counsel to make his submissions after such a finding and in the light of the counsel's submissions to alter, if necessary, this finding. *As defence counsel did not wish to avail himself of this opportunity, the learned President, therefore, convicted the appellant and imposed the sentence. In the circumstances, I cannot see how it can be said that the opportunity to address the court was denied to counsel*. This ground of appeal therefore fails. (emphasis added)

[30] Likewise in the present case, counsel for the applicant refused to submit and left it to the court. It is important to note that even though counsel for the applicant did not make any oral submissions, he did in fact rely on the written submissions filed in the Court of Appeal. This is reflected in the notes of proceedings dated 18 August 2023 as follows:

> YAA KHN - So, what is going to happen to the appeal because we have said that we are proceeding with the appeal
>
> En Hisyam **- I leave it entirely to the court on the appeals**

YAA KHN - You leave it entirely to the court on the appeals? You are not going to submit even any one of the grounds in the petition of appeal?

En Hisyam - **I am not going to submit.** Seriously. I have lost**. I leave it entirely to My Ladies and My Lords**

YAA KHN (after deliver(ing) reasons for rejection to discharge) So may I Tuan Haji, ask you again whether you want to submit anything further?

En Hisyam - **I got nothing to submit** might as well

YAA KHN - can you confirm if you have anything to say on the 94 grounds in the petition of appeal?

En Hisyam - **I got nothing to say**

YAA KHN - So, **are you relying on the submission filed in the COA** in relation to the findings of the High Court?

En Hisyam - Yes

YAA KHN - As these appeals matter of public interest, we would invite the public prosecutor to submit first **with the view to providing the appellant more time to prepare for this (these) appeal**s. (emphasis added)

[31] Further, on 19 August 2022, counsel for the applicant reiterated that he has no submission to make although the court allowed some time for the counsel to submit. This can be seen in the notes of proceedings which states as follows:

YAA KHN - alright. We continue on Tuesday 23/8/2022

En Hisyam - My Ladies, My Lords, **I got no submissions to make**.

YAA KHN - not even oral?

En Hisyam - not even oral

YAA KHN - even on Tuesday

En Hisyam - even on Tuesday

YAA KHN - never mind. We come on Tuesday 23/8 and deal with the matter on Tuesday itself.

En Hisyam - I was wondering whether I can excuse myself because I am going to say the same thing as well on Tuesday

YAA KHN - As I am already mentioned Tuan Haji, we have stated so many times that we are going to proceed with these appeals and you are on record. **Well, you have tomorrow, Saturday, Sunday, Monday. Three days**.

Don't tell us that you are not prepared even to submit any of the 94 grounds in the petition of appeal.

En Hisyam - **I am not taking on any submission**

YAA KHN - It's alright. It's your liberty. (emphasis added)

[32] On 23 August 2022, counsel for the applicant informed the Federal Court that an application to recuse the CJ has been filed and an unsealed application has been served on the respondent. Counsel for the applicant further confirmed that no oral submission on the main appeal was to be made. This is reflected in the notes of proceedings as follows:

> Sithambaram : I confirm that I have been served with the unsealed copy of the notice of motion and the affidavit. Obviously, as the matter of law, it is not proper before us until the sealed is served.
>
> Court : But the recusal is the matter for the bench right? If we proceed perhaps in half an hour's time, you can respond?
>
> Court : Tn Haji, before we give our instruction on the application, **can I just ask you again do you have anything to submit in respect of the appeals**?
>
> Hisyam : **In appeal no**, except the issue of representation. The last part of the submission by the respondent as regards representation by counsel. **In main appeal no**
>
> (emphasis added)

[33] Having considered the factual matrix on this issue as revealed in the notes of proceedings, we find that counsel for the applicant was in fact given the right to be heard by the Federal Court but refused to avail himself of the opportunities given by the court. Counsel for the applicant also confirmed that he was relying on the written submissions that were filed in the Court of Appeal. These included the written submission on conviction and sentence. On sentence alone, we note that the applicant's counsel had filed a separate 16 pages of written submissions. In the circumstances, we do not think that the applicant was denied his right to be heard on both conviction and sentence and hence, no miscarriage or failure of justice was occasioned.

[34] On the issue of failure of justice, it is instructive to refer to the case of *PP v. Ishak Hj Shaari & Other Appeals* [2003] 3 CLJ 843 CA where the test laid down in determining whether the failure of justice occurs are as follows:

> ... In our view, having regard to the aforesaid object of the CPC, the issue whether or not the misdirection has occasioned a *failure of justice can be resolved by seeking answers to certain corollary questions, namely, did the accused have a fair trial, did he know what he was being tried for and whether the allegations and facts were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself? If the answers are in the affirmative, the only conclusion is that there has been no prejudice and failure of justice*. If the answers are in the negative, the trial must necessarily be treated as vitiated. If there exists a reasonable doubt regarding the answers, the benefit of doubt must be given to the accused. But, none of the learned High Court Judges in these appeals did really consider whether or not the misdirection had occasioned a failure of justice. They simply struck it down as an illegality for the aforesaid reasons. With due respect, we are of the opinion that

such approach is not in consonance not only with the modern trend but also not in keeping along with certain well-established and well understood lines that accord with our notion of natural justice that can be discerned from the Indian experience.

...

Whatever it is *what remains to be considered is whether there is sufficient evidence to support the conviction in a particular case and if there is, that would be a good ground for holding that there was no miscarriage or failure of justice*.

(emphasis added)

[35] In the present case, the answers to all the corollary questions laid down in *Ishak Shaari*'s case (*supra*) are in the affirmative in light of the circumstances of the case as discussed earlier. Thus, we do not find any failure of justice as submitted by counsel for the applicant.

[36] The next complaint by the applicant is that the Federal Court has no power to disallow the applicant's counsel to discharge himself from representing the applicant.

[37] On 18 August 2022, counsel for the applicant made an oral application to discharge himself from representing the applicant after the Federal Court dismissed his application for an adjournment of the main appeal. However, the Federal Court disallowed the application. The Federal Court drew an analogy with O. 64 of the Rules of Court 2021 where in a civil case, leave of the court is required before a counsel can discharge from representing his client. Thus, the Federal Court was of the view that the rules should be more stringent in a criminal case.

[38] On this issue, counsel for the applicant submitted that the Federal Court was wrong in disallowing the applicant's counsel to discharge himself from representing the applicant. It was further contended that the Federal Court has no power to prevent counsel to discharge himself in a criminal case. Reliance was also placed *inter alia*, to the High Court case of *Lai Cheng Chong v. PP* (*supra*) and Registrar's Circular No. 6/1960.

[39] The said Registrar's Circular No. 6 of 1960 expressly states that no leave of the court is required for a defence counsel to withdraw from the case as it is 'purely a private matter between counsel and his client and that the court has no power to compel' him to do so. That circular is specifically addressed to "All Presidents, Sessions Courts, All Current Magistrate" and only carbon copied to "All Senior Assistant Registrar, Supreme Court, All Secretaries to Judges". Though it is still in force against the said addressees, *ie*, our subordinate courts, it is obviously not meant and was never intended to apply to the superior courts. As for learned counsel's reliance on the case of *Lumley v. Wagner* (*supra*) which held that the court cannot specifically enforce the performance of the positive part of the contract such as an

undertaking to render personal service, which he submitted includes legal representation as in the case before us, although the cited case was relied upon by this court in *Pertama Cabaret Nite Club Sdn Bhd v. Roman Tam* [1981] 1 LNS 235; [1981] 1 MLJ 149, that legal principle was pronounced and applied as stated above, not in the context of a legal representation but a contract to sign. That factual context in which the said two decisions were made is extremely vital because of the existence of the said O. 64 of the Rules of Court 2012 in our legal jurisprudence and the clear and undisputed legal proposition that a counsel appearing in court is deemed to be an officer of the court. Therefore, in this regard, granted that the law is silent on whether this court has the power to prevent counsel from discharging himself from representing the accused in a criminal case nor is there any statutory provision that expressly prohibits this court from preventing the discharge, but the Federal Court has declared that this court has such power, which ruling is consistent with the inherent powers of this court to prevent abuse of the process of the court which is envisaged under r. 137 of the Rules of the Federal Court 1995. The pronouncement of this court, being the apex court, has thereby laid down a principle of law on this issue. Accordingly, a counsel in a criminal case who intends to discharge himself as counsel for the accused or appellant is required to obtain prior permission or leave from the court. Thus, the contention by counsel for the applicant that the Federal Court has no power to prevent Hj Hisyam Teh from discharging himself from representing the applicant is untenable as that power to prevent abuse of process of the court is contained under r. 137 itself.

[40] There is no justification for this court to depart from this recent decision as it was not plainly wrong or perverse. Further, we do not think that it is good policy for the Federal Court, as the apex court, to depart from our recent decisions as this will leave the law in a state of uncertainty. We reaffirm the views expressed by the Federal Court in *Tunde Apatira & Ors v. PP* [2001] 1 CLJ 381 which states as follows:

> *It is bad policy for us as the apex court to leave the law in a state of uncertainty by departing from our recent decisions*. Members of the public must be allowed to arrange their affairs so that they keep well within the framework of the law. They can hardly do this if the judiciary keeps changing its stance upon the same issue between brief intervals. *The point assumes greater importance in the field of criminal law where a breach may result in the deprivation of life or liberty or in the imposition of other serious penalties*. Of course, if a decision were plainly wrong, it would cause as much injustice if we were to leave it unreversed merely on the ground that it was recently decided. In a case, as the present, this court will normally follow the approach adopted by the apex courts of other Commonwealth jurisdictions as exemplified by such decisions as *R v. Shivpuri* [1986] 2 All ER 334.

> The second reason is closely connected to the first. It also has to do with certainty in the law. The decision in *Muhammed bin Hassan* has been affirmed by our courts (see: *Public Prosecutor v. Ong Cheng Heong* [1998] 4 CLJ 209) and convictions have been quashed by this court acting on its strength. See, for example, *Harvadi Dadeh v. Public Prosecutor* [2000] 3 CLJ 553. If we accept the learned deputy's invitation to depart from *Muhammed bin Hassan*, it will throw the law into a state of uncertainty and cast doubt on the accuracy of the pronouncements made in those cases that have so recently applied the interpretation formulated in that case. *It is bad policy for us to keep the law in such a state of flux, especially upon a question of interpretation of a statutory provision that comes up so often for consideration before the courts*. (emphasis added)

[41] Thus, the applicant's contention that the court has no power to prevent the applicant's counsel from discharging himself from representing the applicant is without merit.

The Decision On 23 August 2022, Dismissing The Applicant's Application To Recuse The Chief Justice ('The CJ') From Hearing The Main Appeals Of The SRC Case

[42] The application to recuse the learned CJ from hearing the appeal is premised on two grounds that firstly, the learned CJ's husband, Dato' Zamani Ibrahim had on 11 May 2018 posted a posting on his Facebook account which was said shows his negative sentiments towards the applicant and which would influence the learned CJ's decision in the appeal. Secondly, the learned CJ had expressed no objection for members of the Malaysian Bar to apply for adjournments to attend the "walk for justice" on 17 June 2022 in opposing the investigation against Justice Nazlan who was the trial judge in the SRC case.

[43] The law on recusal of a judge is also well settled. The applicable test on whether a judge should be recused is 'a real danger of bias' test not perception of bias. This principle of law was reiterated in *PP v. Tengku Adnan Tengku Mansor* [2020] 9 CLJ 30; [2020] 9 MLJ 30 FC as follows:

> [12] *The governing law in this country applies the test laid down in Regina v. Gough [1993] AC 646 and is summarily stated to be a 'real danger of bias'*. The test was first adopted in *Majlis Perbandaran Pulau Pinang v. Syarikat Berkerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65; [1999] 3 MLJ 1 by Edgar Joseph J in a judicial review case, reiterated in *Mohamed Ezam Mohd Nor & Ors v. Ketua Polis Negara* [2001] 4 CLJ 701; [2002] 1 MLJ 321, the only criminal case dealing with bias in the context of a *habeas corpus* application and *Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal* [2006] 1 CLJ 577; [2006] 2 MLJ 293, another civil matter relating to striking out under O. 18 r. 19 RHC.
>
> [13] In all these cases, the question before the court, as it is in this case is whether, having regard to the facts and circumstances, there was a real danger of bias on the part of the learned trial judge when he heard the case involving the respondent.

A [14] *What does 'real danger of bias' mean?* In explaining this Lord Goff stated *inter alia*:

> ... In my opinion, if, in the circumstances of the case (as ascertained by the court) it appears that there was *a real likelihood, in the sense of a real possibility, of bias on the part of a justice* or other member of
B an inferior tribunal, justice requires that the decision should not be allowed to stand. Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event, the court has first to ascertain the relevant
C circumstances from the available evidence, knowledge of which not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance of doubt, *I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias*. Accordingly, having ascertained the relevant circumstances, the court should ask itself
D whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him ... (emphasis added)

E **[44]** Reverting to the present case, we find that the learned CJ in her grounds of judgment on recusal had identified and applied the correct test to the facts. This is reflected *inter alia,* in paras. 6, 11, and 14 of the judgment which states this:

> [6] The question is **whether the grounds of the application to recuse**
F **successfully raise a real danger of bias**. In my view, based on the decided cases, the test has not been established.
>
> ...
>
> [11] Thus, **in proving the real danger of bias test**, it must be shown that the views expressed by third party, in this case, the spouse, actually
G impacted on the views of the judge sought to be recused as opposed to simply presupposing that just because certain general views were expressed as a citizen they are automatically the views of the judge presiding. In other words, the fact of a 'spousal relationship' is not by itself a reason to ascribe the spouse's view to the judge.
>
H ...
>
> [14] The second ground is a non-starter. The letter clearly states that I had no objection should lawyers seek to apply for the adjournments of their cases from the panels hearing their cases. This was not a blanket grant of adjournments. It was simply to say that the different panels at
I different chairs retain their discretions to grant or refuse adjournments. It was a standard letter. I do not see how this discloses any fear or **real danger of bias** sufficient to recuse me. (emphasis added)

[45] The decision of the learned CJ not to recuse herself from hearing the appeal was also supported by the other panel members of the Federal Court who came up with a joint supporting decision. In the circumstances, there is no basis for this court to review the recusal decision.

[46] For completeness, counsel for the applicant had also argued that the learned CJ should not have heard the recusal application and that there was a quorum failure as the decision was made by only four-member panel which was in contravention of s. 74 of the CJA.

[47] On this issue, we have already decided, at the application to recuse Justice Abu Bakar Jais in this proceedings that Justice Abu Bakar may hear the recusal application. We do not see any reason to depart from our said decision. There is a plethora of authorities which say that a judge can hear his or her recusal application. The case of *Raja Petra Raja Kamarudin v. Menteri Dalam Negeri* [2010] 4 CLJ 25 cited by the applicant to support his contention can easily be distinguished on the facts. In that case, the judge had voluntarily requested to be excused from hearing the application to recuse him. In this circumstance, the issue of quorum failure does not arise.

The Decision On 23 August 2022, Dismissing The Applicant's Main Appeals Of The SRC Case

[48] Essentially, counsel for the applicant argued that the applicant was not given the right to be heard which occasioned a breach of natural justice and the judgment on the main appeal is not a reasoned or speaking judgment.

[49] We have already dealt with the issue of the right to be heard in the earlier part of our judgment.

[50] On the issue of reasoned or speaking judgment, we reiterate here that merits of the appeals are not reviewable as this is not an appeal. In any event, we find that the Federal Court had read the appeal records, considered the 94 grounds of appeal, the written submissions by parties filed in the Court of Appeal, and the written judgments of the High Court and the Court of Appeal before coming to its decision on the main appeal. This fact is self-evident in paras. 22 and 28 of the grounds of judgment which states:

> [22] Having said that, *we shall now proceed to consider the appellant's appeal by having regard to the appeal records including the petition of appeal setting out no less than 94 grounds of appeal, the submissions filed in the Court of Appeal and the written judgment of the High Court and the Court of Appeal*.
>
> ...
>
> [28] In these circumstances, we shall now proceed to state our findings in relation to the appeals. In the absence of any submissions from the appellant, *we turn our attention to the 94 grounds of appeal in the petition of appeal. We have examined them carefully and in great detail*. In our view, they disclose in essence, the following main complaints ... (emphasis added)

[51] The Federal Court also considered the evidence presented by the prosecution to prove a *prima facie* case and the defence put forward by the applicant. Having considered all the evidence on the record and the grounds of appeal, the Federal Court found that all the convictions against the applicant are safe and all the sentences imposed on the applicant are not manifestly excessive. In the circumstances, the convictions and sentences were affirmed. This is reflected in paras. 37 and 38 as follows:

> [37] Thus, we are unable to conclude that any of the findings of the High Court, as affirmed by the Court of Appeal were perverse or plainly wrong so as to warrant appellate intervention. We agree that the defence is so inherently inconsistent and incredible that it does not raise a reasonable doubt on the prosecution case.
>
> [38] In the circumstances, and having pored through the evidence, the submissions and the rest of the records of appeal, we find the appellant's complaints as contained in the petition of appeal devoid of any merit. On the totality of evidence, we find the conviction of the appellant on all seven charges safe. We also find that the sentence imposed is not manifestly excessive.

[52] In our considered view, the applicant's argument that it is not a speaking judgment as it was unsupported by reasons is preposterous. The pronouncement on 23 August 2022 is a judgment of the Federal Court which unequivocally decided on the points in issue before it, including the 94 grounds of appeal. Any view to the contrary as to the efficacy of that judgment would lay open the door to similar contentions in relation to decisions of this court and indeed of other courts as well as in matters where brief oral judgments are delivered at the conclusion of argument. Here, we are referring to the judgment of the Federal Court, the apex court, which is the subject matter of the present review application and not the 815 pages of the grounds of judgment of the trial judge or 317 pages of the grounds of judgment of the Court of Appeal.

[53] On the same issue, this court recently in *See Teow Koon v. Kian Joo Can Factory Bhd & Ors* [2022] MLJU 3546 affirmed the principle that the lack of reasoned grounds of judgment *per se* is not a breach of natural justice which is subject to review under r. 137. In para. 37 of the case, this was said:

> [37] Moving to the last issue about *the lack of reasoned grounds of judgment*, we understand the applicant was fully aware of the reasons for the decision of the majority at the material time. *What the applicant does not have are full written reasonings of the full bench*. With respect, we again disagree that that reason is of itself sufficient for our exercise of discretion to review the earlier decision. *Albeit* brief, the reasons for the majority's decision were explained. In fact, the Federal Court in *Lim Lek Yan @ Lim Teck Yam v. Yayasan Melaka and another application* [2010] 1 MLJ 173 held that *the absence of grounds of decisions alone could not constitute a basis for the Federal Court to exercise its powers of review. More so when reasons were given in the present case.*

We add that the absence of full written grounds does not in any way render the decision made any less a legal and binding judgment. We therefore cannot find any basis for a charge of breach of natural justice. (emphasis added)

Conclusion

[54] Regrettably, the applicant's response to the dismissal of his applications and appeals before this court has been wholly disproportionate. He deposed in his supporting affidavit that "... I have been deprived of my fundamental liberties accorded to me under the Federal Constitution of a fair appeal, which is a derivative of fair trial principles."

[55] In our considered view, the applicant is not in a position to be objective as he cannot accept that this court could decide the applications and the appeals against him unless there was bias, breach of natural justice, and/or abuse of process. The fact that his feelings may be genuine cannot be allowed to dictate our conclusion. In the final analysis and having regard to all the circumstances in this matter, we are constrained to say with respect that the applicant was the author of his own misfortune.

[56] Ultimately, the impugned decisions are matters of opinion both in law and on the facts. Even if we are inclined to take a different view (we do not say that we do or do not agree with the said decisions), that is not a ground to review the impugned decisions.

[57] In conclusion, we can see no objection in law to the course to which the earlier panel of this court took given the unusual circumstances of this case.

[58] In *Asean Securities Paper Mills* (*supra*), this court speaking through Zaki Tun Azmi PCA (as he then was) stated that r. 137 of the Rules of the Federal Court 1995 is an affirmation of this court's inherent jurisdiction to hear any application or to make any order to prevent injustice or abuse of process of the court. We take this occasion to emphasise that whilst r. 137 may be invoked by a party who is dissatisfied with a judgment of this court to prevent injustice or to prevent an abuse of the process of the court, r. 137 should never be invoked unless that case falls within the limited grounds and very exceptional circumstances in which a review may be made. Absent said limited grounds and very exceptional circumstances, the invocation of r. 137 by a dissatisfied party would constitute an abuse of the process of the court. We stress that r. 137 should never be used to abuse the process of the court, and that any abuse of the process of the court is to be deprecated.

[59] For the foregoing reasons, we are of the view that the review application did no more than challenge the merits of the Federal Court's decisions. Accordingly, the review application should be and is hereby dismissed.

Abdul Rahman Sebli CJ (Sabah & Sarawak) (dissenting):

[60] The applicant was convicted and sentenced to a concurrent imprisonment term of 12 years and a fine of RM210 million in default another five years imprisonment by the Kuala Lumpur High Court on 28 July 2020 for seven separate offences under the Malaysian Anti-Corruption Commission Act 2009, the Penal Code and the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001.

[61] His convictions and sentence were affirmed by the Court of Appeal on 8 December 2021 and perfected by the Federal Court on 23 August 2022. Presently, the applicant is serving his imprisonment term at the Kajang prison since 23 August 2022.

[62] By four notices of motion, the applicant seeks a review of four decisions of this court delivered on 16 August 2022 and 23 August 2022 respectively. The four notices of motion are in the following terms:

> Notice of Motion No. 1
>
> 1. That the decision of the Federal Court on the 16th of August 2022 in the Criminal Appeal No. 05(L) - (289 & 290 & 291) - 12/2021(W) (in the Motions to adduce additional/further evidence and for the disqualification of Justice YA Dato' Mohd Nazlan bin Mohd Ghazali in the High Court Trial (WA-45(2 & 3)-07/2018 and WA-45-5-08/2018 and for the nullification of that trial or for it to be declared null and void) wherein the Honourable Federal Court had unanimously dismissed the Applications/Motions altogether in Enclosures 210, 31, 32 (as amended), be set aside. That in the event this prayer is granted by this Honourable Court, this Honourable Court orders a discharge and acquittal of the Applicant or an order for a retrial of the charges in the High Court before a different judge:
>
> Notice of Motion No. 2
>
> 2. That the decision of the Federal Court on the 16th of August 2022 in the Criminal Appeal No. 05(L) - (289 & 290 & 291) - 12/2021(W) in the Application for adjournment where the Honourable Federal Court unanimously refused to grant any adjournment on the main appeals, be set aside. A further order is sought for an acquittal and discharge of the Applicant or in the alternative a rehearing of the appeal before this Honourable Court with a newly constituted quorum of not less than 7 Federal Court Judges or as this Honourable Court deems fit and just;
>
> Notice of Motion No. 3
>
> 3. That the decision of the Federal Court on the 23rd of August 2022 in the Criminal Appeal No. 05(L) - (289 & 290 & 291) - 12/2021(W) (for the recusal of the Chief Justice) where the Honourable Federal Court unanimously dismissed the application of the Applicant/Appellant to recuse the Honourable Chief Justice from further hearing the said

Appeals, be set aside. In the event this prayer is allowed for the Honourable Federal Court to further order a rehearing of this Appeal before a newly constituted quorum of not less than 7 members or as this Honourable Court deems fit and just.

Notice of Motion No. 4

4. That the decision of the Federal Court on 23rd of August 2022 in the Criminal Appeal No. 05(L) - (289 & 290 & 291) - 12/2021(W) (in the main appeals) where the Honourable Federal Court unanimously dismissed the appeals of the Applicant and confirmed the conviction and sentence handed down by the High Court and the Court of Appeal, be set aside. That in the event this prayer is allowed, this Honourable Court orders the acquittal and discharge of the Applicant or in the alternative a rehearing of the main appeal before another newly constituted quorum of not less than 7 Federal Court Judges or as this Honourable Court deems fit and just.

[63] The first three motions arose from three applications made by the applicant before the main appeals (Appeals No. 05(L) - (289 & 290 & 291) - 12/2021(W)) were heard by the earlier panel of this court. They were therefore interlocutory in nature *vis-à-vis* the main appeals. For purposes of this judgment, I shall focus on Motion No. 2 which in my opinion is determinative of the question whether a review under r. 137 of the Rules of the Federal Court 1995 ("the Rules") is warranted. Rule 137 of the Rules provides as follows:

For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to hear any application or to make any order as may be necessary **to prevent injustice** or to prevent an abuse of the process of the Court.

(emphasis added)

[64] I shall express no opinion on the other three motions. The word "court" means the Federal Court and any judge of that court (r. 2). The provision is a codification of the inherent jurisdiction of the Federal Court. The term "inherent jurisdiction" is summed up in *Halsbury's Laws of England* (4th edn, vol. 37) as follows at para. 12:

In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, *in particular to ensure the observance of the due process of the law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them*.

(emphasis added)

[65] The legislative intent behind r. 137 is clear, that the court's inherent power of review is to be exercised whenever necessary to prevent injustice or to prevent an abuse of the court process. However the power must be

exercised with circumspection and in rare and exceptional cases. Whether the decision under consideration has caused injustice to any party depends on the facts and circumstances of each case.

[66] There is no dearth of authority on the rule. Suffice it if I refer to three decisions of this court. First, *Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 6 CLJ 1 where Abdul Hamid Mohamad CJ held as follows:

> [4] In an application for a review by this court of its own decision, the court must be satisfied that it is a case that falls within the limited grounds and very exceptional circumstance in which a review may be made. Only if it does, that the court reviews its own earlier judgment. Under no circumstances should the court position itself as if it were hearing an appeal and decide the case as such. In other words, it is not for the court to consider whether this court had or had not made a correct decision on the facts. That is a matter of opinion. Even on the issue of law, it is not for this court to determine whether this court had earlier, in the same case, interpreted or applied the law correctly or not. That too is a matter of opinion. An occasion that I can think of where this court may review its own judgment in the same case on question of law is where the court had applied a statutory provision that has been repealed. I do not think that review power should be exercised even where the earlier panel had followed certain judgments and not the others or had overlooked the others. Not even where the earlier panel had disagreed with the court's earlier judgments. If a party is dissatisfied with a judgment of this court's own earlier judgments, the matter may be taken up in another appeal in a similar case. That is what is usually called "revisiting". Certainly, it should not be taken up in the same case by way of review. That had been the practice of this court all these years and it should remain so. Otherwise there will be no end to litigation. A review may lead to another review and a further review.

[67] Zaki Tun Azmi PCA (later CJ) in his supporting judgment in the same case said:

> There is no doubt that this court has that authority to allow this application. Whether it does so, depends on the circumstances of each case. This court has on many previous occasions decide that it has the right to order a review of its own decision to prevent injustice or an abuse of the process of the court. It has that very wide discretion. However, that wide discretion will not be used liberally but only sparingly, in exceptional cases on a case to case basis where a significant injustice had probably occurred and there was no alternative effective remedy. The court must exercise strong control over such application. It must be satisfied that it is within exceptional category. Rule 137 cannot be construed as conferring unlimited power to review its earlier decision for whatever purpose. The court must not be too eager to invoke the rule.

[68] As for the circumstances in which an application under r. 137 of the Rules may be allowed, Zaki Tun Azmi PCA (later CJ) listed the following non-exhaustive circumstances as some of them, which is far less restrictive than what Abdul Hamid Mohamad CJ had in mind, who only mentioned a case where the court had applied a statutory provision that has been repealed:

> (a) That there was a lack of quorum *eg*, the court was not duly constituted as two of the three presiding judges had retired (*Chia Yan Tek & Anor v. Ng Swee Kiat & Anor* [2001] 4 CLJ 61).
>
> (b) The applicant had been denied the right to have his appeal heard on the merits by the appellate court (*Megat Najmuddin bin Dato Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd* [2002] 1 CLJ 645).
>
> (c) Where the decision had been obtained by fraud or suppression of material evidence (*MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 3 CLJ 577).
>
> (d) Where the court making the decision was not properly constituted, was illegal or was lacking jurisdiction, but the lack of jurisdiction is not confined to the standing of the quorum that rendered the impugned decision (*Allied Capital Sdn Bhd v. Mohd Latiff bin Shah Mohd And Another Application* [2004] 4 CLJ 350).
>
> (e) Clear infringement of the law (*Adorna Properties Sdn Bhd v. Kobchai Sosothikul* [2005] 1 CLJ 565).
>
> (f) It does not apply where the findings of this court is questioned, whether in law or on the facts (since these are matters of opinion which this court may disagree with its earlier panel) (*Chan Yook Cher @ Chan Yock Kher v. Chan Teong Peng* [2005] 4 CLJ 29).
>
> (g) Where an applicant under r. 137 has not been heard by this court and yet through no fault of his, an order was inadvertently made as if he had been heard (*Raja Prithwi Chand v. Sukhraj Rai* [AIR] 1941).
>
> (h) Where bias had been established (*Taylor & Anor v. Lawrence & Anor* [2002] 2 All ER 353).
>
> (i) Where it is demonstrated that the integrity of its earlier decision had been critically undermined *eg*, where the process had been corrupted and a wrong result might have been arrived at (*Re Uddin* [2005] 3 All ER 550).
>
> (j) Where the Federal Court allows an appeal which should have been consequently dismissed because it accepted the concurrent findings of the High Court and Court of Appeal (*Joceline Tan Poh Choo & Ors v. V. Muthusamy* [2007] 6 CLJ 1; [2007] 6 MLJ 485). (emphasis added)

[69] Secondly the case of *Dato' See Teow Chuan & Ors v. Ooi Woon Chee & Ors And Another Appeal* [2013] 4 CLJ 901; [2013] 4 MLJ 351 where Arifin Zakaria CJ also spoke of the grounds on which an application for review under r. 137 of the Rules may be allowed:

A [18] From the authorities, it would appear that an application may be allowed on the grounds of:

(a) bias (*Taylor v. Lawrence*);

(b) coram failure (*Gurbachan Singh s/o Bagawan Singh & Anor v. Vellasamy s/o Pennusamy & Ors And Other Applications* [2012] 2 MLJ 149;

B

(c) fraud or suppression of material evidence (*MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673; [2002] 3 CLJ 577; *Re Uddin*; or

(d) **procedural unfairness** (*Cassel & Co Ltd v. Broome And Another (No. 2)* [1972] 2 All ER 849; [1972] AC 1136.

C

[19] From the above, we can briefly summarise that this court as a court of law is clothed with inherent jurisdiction to remedy any injustice arising from procedural unfairness due to coram failure, **breach of the rules of natural justice** or that the decision was tainted by actual bias or a real danger of bias on the part of one or more members of the panel.

D (emphasis added)

[70] I would add another category that calls for review under r. 137, and that is if the decision has caused a miscarriage of justice resulting from a denial of a fair trial, for example where the decision altogether defeats the rights of the parties.

E

[71] The third case is *Datuk Seri Anwar Ibrahim v. Government Of Malaysia & Anor* [2021] 6 CLJ 1; [2022] 1 MLJ 1. The following para. [36] of the judgment is relevant:

[36] However, in the rarest of rare cases, where the final judgment
F complained of has caused grave injustice which is apparent from the face of the record, and which can lead to public misgivings about the administration of justice, the court hearing the application for review is obliged to rectify the error. *In such a case, the public interest of ensuring justice is done must take precedence over the interest of certainty and finality. The reason for this is that a failure to remedy such injustice will undermine the overriding public*
G *interest that there should be confidence in the administration of justice (see R v. Gough [1993] 2 All ER 724 at p. 728).* (emphasis added)

[72] Thus, while the principle of finality in the criminal law must be kept at the forefront of the court's mind when dealing with an application for review under r. 137 of the Rules, it must not be allowed to overshadow the
H criminal process, which is to be measured, not in monetary terms, but in terms of life and liberty. As Chao Hick Tin JA aptly said in the Singapore Court of Appeal case of *Kho Jabing v. PP* [2016] SGCA 36:

42. However, the cost of error in the criminal process is measured not in monetary terms, but in terms of the liberty and, sometimes, even the life
I of an individual. For this reason, where criminal cases are concerned, the principle of finality cannot be applied in as unyielding a manner as in the civil context, and it seems that the court should, in exceptional cases, be

able to review its previous decisions **where it is necessary to correct a miscarriage of justice**. The question would then be this: when do these conditions obtain? In the present criminal motion, we confront this very issue. (emphasis added)

[73] Having referred to a long line of authorities both local and abroad, including the decisions of this court in *Asean Security Paper Mills* and *Dato' See Teow Chuan* (*supra* at [7] and [10]), the learned judge of the Singapore apex court went on to say at paras. 43, 62 and 63:

43. Gathering up the threads of the foregoing analysis, several propositions can be distilled:

(a) First, a final appellate court has the inherent power, by virtue of its character as a court of justice, to correct its own mistakes in order to prevent miscarriages of justice or, to use a cognate expression favoured in England, "real injustice".

(b) Second, this power of review is to be exercised sparingly, and only in circumstances which can be described as "exceptional" and which therefore override the imperative of finality.

(c) Third, a review by a final appellate court is distinct from and should not be confused with an appeal. In conducting a review, the court is primarily concerned not with the correctness of the decision under review, but with whether there has been a miscarriage of justice. These concepts are not the same. **The paradigm case of a miscarriage of justice is where there has been a breach of natural justice**.

(d) Fourth, the substratum of an application for review should be new material that was not previously canvassed in the proceedings leading to the decision under challenge. The material in question must demonstrate a "powerful probability" that there has been a miscarriage of justice which warrants invoking the court's review jurisdiction.

(e) Finally, this power of review is available in both civil and criminal cases, although the rules governing its exercise might differ depending on the context.

...

62. At the end of the day, the inquiry into whether the material tendered in support of an application for review "is compelling" is directed towards the quality of the material presented as assessed against the precise issues in dispute. *A useful summative question is whether, taken as a whole, the material is capable of showing "almost conclusively" that there has been a miscarriage of justice and is therefore "compelling" enough to warrant the exercise of the Court of Appeal's inherent power of review*. This is a question of fact which calls for an exercise of judgment of the kind that judges are called on to perform on an almost daily basis.

A

63. *At its core, it connotes that there must be a manifest error and/or an egregious violation of a principle of law or procedure which strikes at the very heart of the decision under challenge and robs it of it's character as a reasoned judicial decision*.
(emphasis added)

[74] Thus, although the reopening of an appeal is considered exceptional
B and only in rare cases, the power to reopen is plainly available. The principle has not prevented re-opening by apex and intermediate courts of criminal appeals: *Elliot v. R* (2007) 234 CLR 38; *DPP v. Majewski* [1977] AC 443; *R v. Maughan* [2004] NICA 21; *R v. Trotta* [2007] 3 SCR 453; *R v. Smith* [2003] 3 NZLR 617; *R v. De May* [2005] NZCA.

C **[75]** Justice is not only about the guilt or innocence of the accused person. It is also about according him a fair trial. The accused person should feel that he has had a fair trial (*Kiew Foo Mui & Ors v. PP* [1996] 1 CLJ 14). If he cannot be tried fairly for the offence that he is charged with, he should not be tried for it at all (*R v. Horseferry Riad Magistrates' Court, ex p Bennet* [1994]
D 1 AC 4). The principle applies equally to appeals as appeals are by way of rehearing.

[76] In *Dietrich v. R* [1993] 3 LRC 272, Mason CJ and McHugh J of the High Court of Australia, which is the apex court in the country, said of the right to a fair trial at p. 280:

E

The right of an accused to receive a fair trial according to law is a fundamental element of our criminal justice system: see *Jago v. District Court (NSW)* (1989) 168 CLR 23, per Mason CJ at 29; Deane J at 56; Toohey J at 72; Gudron J at 75.

F **[77]** In his *Commentary on the Constitution of India*, vol. 5, 9th edn, (India LexisNexis, 2015) Durga Das Basu said:

A fair trial is aimed at ascertaining the truth for all concerned. It was held that failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. *Fair hearing requires an opportunity to preserve the process. It may be vitiated and violated by*
G *an over-hasty, stage-managed, tailored and partisan trial. Denial of right of accused to adduce evidence in support of his defence amounts to denial of fair trial*.
(emphasis added)

[78] In *Alma Nudo Atenza v. PP & Another Appeal* [2019] 5 CLJ 780; [2019] 4 MLJ 1, this is what this court had to say on the right to a fair trial at
H para. [109]:

[109] Accordingly, art. 5(1) which guarantees that a person shall not be deprived of his life or personal liberty (read in the widest sense) save in accordance with law envisages a state of action that is **fair both in point of procedure and substance**. In the context of a criminal case, the article
I enshrines an accused's constitutional right to receive a fair trial by an impartial tribunal and to have a just decision on the facts (see *Lee Kwan Woh* at para 18). (emphasis added)

[79] In *Hong Yik Plastics (M) Sdn Bhd v. Ho Shen Lee (M) Sdn Bhd & Anor* [2020] 4 CLJ 479; [2020] 1 MLJ 743 Vernon Ong Lam Kiat JCA (now FCJ) explained the right more comprehensively:

> [10] A fair trial is generally defined as a trial by an impartial and disinterested tribunal in accordance with law. The right to a fair trial is generally construed in the light of the rule of law. The right to a fair trial is also a fundamental right pursuant to art. 8 of the Federal Constitution which provides for equality before the law and equal protection under the law; otherwise described as the principle of equality among citizens. In this connection, the common law has long recognised two minimum fair trial guarantees known as the principle of natural justice: *(a) the principle of judicial impartiality (nemo judex in causa sua); and (b) the right to be heard (audi alteram partem) (Jackson, P, Natural Justice (2nd Ed, Sweet & Maxwell, London 1973)*. The right to a fair trial has also evolved to encompass a right to access to the courts, public hearings and a hearing within a reasonable time.
>
> [11] In both civil and criminal cases rights exist and are being adjudged. In each the same inherent and constitutional rights exist. In each the duty of the trial judge is the same. In each the parties are entitled to justice under the law. Concomitant with this is the trial judge's duty to determine and apply the law applicable to the facts found. To the lowest and humblest, to the weak, the poor, and the strong, the same law applies. To be equally administered by a judge. *However, justice does not exist in substantive law alone. Justice in the application of substantive law is dependent on the pre-existent fairness of the procedure; in other words, procedural due process in the trial of the cause*. Procedural due process is not only for the parties, but, also, for the court itself. Only thereby can it appeal to, and justify the trust and confidence of the public.
>
> (emphasis added)

[80] In *N Jrishna Murthy, Accused v. Abdul Sabban And Another* 1964 KAR 102 (Karnataka High Court) Hedge J said:

> *One of the contents of natural justice, which we so much value, is the guarantee of a fair trial to an accused person. A fair trial is as important as a just decision. Neither the one nor the other can be sacrificed. Sacrifice of the one, in the generality of cases, is bound to lead to the sacrifice of the other. The two are closely interlinked*. The way to justice, on occasions, may be long and laborious. But we have to go all that way. Because that is the only surest way. Short cuts to justice, though quite tempting, are full of dangerous possibilities. Recent history of several dictatorial countries bear testimony to that fact. Judges know by experience that the first impression may not always be the right impression and truth may be hidden behind imposing facades. In Courts of law nothing can or should be taken for granted. Everything must be tested – tested by the laws of the land which are the quintessence of experience of life; if it is oral evidence it must be tested by cross-examination and if it is a question of probabilities, it must be tested by comparing the various versions put forward by concerned parties, *which means that those parties should have had reasonable opportunity to put forward their*

versions. In short a fair trial which is not the same thing as a trial strictly in accordance with the rules of procedure is a must. A denial of fair trial is a denial of justice. (emphasis added)

[81] Denying the accused of a fair trial is a grave injustice. *The Concise Oxford English Dictionary* (11th edn) defines the word "injustice" as "an unjust act or occurrence". It is an act that inflicts undeserved hurt to another. Rule 137 of the Rules is there to remedy the perpetuation of such unjust acts. In the words of Lord Diplock in *Bremer Vulkan Schiffbau and Maschinenfabrik v. South India Shipping Corp* [1981] 1 All ER 289 "the doing by the court of acts which it needs must have power to do in order to maintain its character as a court of justice."

[82] Ultimately, a review under r. 137 of the Rules is to protect the integrity of the judicial process as opposed to an appeal which is primarily concerned with the merits of the case, subject to the infringements listed out by Zaki Tun Azmi PCA (later CJ) in *Asean Security Paper Mills Sdn Bhd* (*supra* at [9]) and by Arifin Zakaria CJ in *Dato' See Teow Chuan* (*supra* at [10]). In those circumstances, the decisions will be subject to review.

[83] Therefore, it is not entirely correct to say that a review under r. 137 is only confined to those circumstances mentioned by Abdul Hamid Mohamad CJ in his judgment in *Asean Security Paper Mills Sdn Bhd* (*supra* at [7]) because a clear infringement of the law for example, is a ground for review as decided by Zaki Tun Azmi PCA in the same case, citing *Adorna Properties Sdn Bhd v. Kobchai Sosothikul* [2005] 1 CLJ 565. So is failure by the appellate court to hear the merits of the case. Abdul Hamid Mohamad CJ's judgment restricting the applicability of r. 137 to cases where the court had applied repealed laws must be understood in that light. Of pertinence to note is that the learned CJ did not express any disagreement with Zaki Tun Azmi PCA on the matter.

[84] Judicial process is the series of steps taken in the course of the administration of justice, which must be fair at every stage. The question that calls for determination in an application under r. 137 is not whether the decision of the court of final appeal is right or wrong on the merits (subject to what I have said in paras. [23] and [24] above), but whether an injustice had been done to the applicant or whether an abuse of the court process had been committed. If the answer to either question is in the affirmative, then it is the duty of the court to review the decision to prevent the injustice done even if the decision is unassailable on the merits because a fair trial is as important as a just decision (*N Jrishna Murthy*, *supra* at [21]).

[85] With the foregoing principles in mind, I shall now proceed to deal with Motion No. 2 – the application to set aside the decision of the earlier panel to refuse an adjournment of the main appeals. The decision has since been reported in *Dato' Sri Mohd Najib Hj Abdul Razak v. PP And Other Appeals (No 2)* [2022] 8 CLJ 378.

[86] The issue is whether the refusal by the earlier panel to grant an adjournment of the main appeals was unjust in all the circumstances of the case. The question has no direct relation to the issue of whether the decision by the earlier panel to refuse the adjournment was right or wrong on the merits. Anyway, the guiding principle is that the court is not to treat an application for review as if it is an appeal (*Asean Security Paper Mills Sdn Bhd*, *supra* at [7]). Any reference to the merits of the decision in this judgment is purely incidental to the question whether the decision of the earlier panel had caused injustice to the applicant which is the central issue in the present application.

[87] The reasons given by the earlier panel for refusing to adjourn the hearing of the main appeals were as follows:

> [17] Firstly, from our narration of the procedural history on the fixing of these appeals, all parties to this matter, including the appellant, were well aware that the appeals had been fixed for hearing on 15 to 26 August 2022 since April 2022 and the request for an adjournment on the same ground had been refused.
>
> [18] In this regard, we find r. 6(a) of the Legal Profession (Practice and Etiquette) Rules 1978 ('1978 Rules') most relevant. It stipulates thus:
>
> > Rule 6. An advocate and solicitor not to accept brief if unable to appear
> >
> > (a) An advocate and solicitor shall not accept any brief unless he is reasonably certain of being able to appear and represent the client on the required day.
>
> [19] Thus, where counsel has accepted a brief, he should be deemed as 'reasonably certain of being able to appear and represent the client on the required day'. The 1978 Rules also appear to recognise the general disposition of the courts in this country to disfavour adjournments unless cogent reasons are provided. The general rule is that counsel shall make every effort to be ready for trial (and we think by extension appeals) on the day fixed. See r. 24(a) and (b) of the 1978 Rules.
>
> [20] The 1978 Rules are not, in a sense, binding on the courts. But they are nevertheless binding on members of the Bar who are obliged to comply with them. And they are indicative of the fact that any disciplined lawyer such as the counsel for the appellant would not have accepted a brief with dates already fixed for hearing unless he was prepared.
>
> [21] In fact, the appellant having been well aware of the dates fixed for hearing elected to discharge his former solicitors and appoint Messrs Zaid Ibrahim and Tuan Hj Hisyam Teh as his solicitors and counsel respectively. This is his right to do so but he cannot, after having made that decision, turn around and say that his new lawyers are not ready to proceed with the hearing of the appeals. The new lawyers too, having accepted the brief, are not entitled to say they need more time to prepare knowing fully well that the dates had been fixed well in advance.

A [22] Given the circumstances we have outlined, the request for the adjournment and the grounds in support thereof are neither cogent nor reasonable.

[23] In this regard, we recall the following words of Harun J from *PP v. Mohtar Abdul Latiff* [1980] 1 LNS 62; [1980] 2 MLJ 51, at pp. 51 to
B 52:

> In any criminal trial, there are three parties, the court, the prosecution and the defence. If dates of hearing are to be fixed at the convenience of all three parties, then trial dates will be fixed at some considerable time hence. There is of course no guarantee,
C as happened in this case, that the trial will go on as scheduled on the date fixed, if everyone's convenience is taken into account. The general rule, therefore, has always been that trial dates are fixed at the convenience of the court, on a first-come-first-served basis. This is fair to all concerned. Public funds are not wasted on idle courts when there is so much work to do.

D [24] The stark reality is that considerable public funds would be wasted if granting an adjournment in a case of this kind was an easier option. Article 8 of the Federal Constitution and the rule of law demand that the appellant be treated just like any other accused. As such, we state again that while the appellant is entitled to his right to change his counsel, he
E is not entitled to make this choice at the expense of the court, the prosecution or the entire justice system.

[25] While on this subject, another very significant component of the right to a fair trial is that justice cannot be unduly delayed. In this regard, we remind ourselves of Arahan Amalan Ketua Hakim Negara No. 2/2003 which states that cases of this nature must be prioritised.

F [26] Further, the time taken on this case, especially the number of days fixed for the hearing means many other criminal cases and accused persons have had to wait their turn for their appeals to be heard. Justice delayed in this case is also justice denied to the other accused persons.

[88] The reasons can be reduced to the following five factors:

G (i) Rule 6(a) of the Legal Profession (Practice and Etiquette) Rules 1978 which was binding on the applicant's counsel prohibited him from accepting the brief with dates already fixed for hearing unless he was prepared;

H (ii) considerable public funds would be wasted if an adjournment was granted;

(iii) justice would be unduly delayed if an adjournment was granted;

(iv) the Chief Justice Practice Direction No. 2 of 2003 requires cases of this
I nature to be given priority; and

(v) an adjournment would delay cases of other accused persons.

[89] In its grounds of judgment for the main appeals as reported in *Dato' Sri Mohd Najib Hj Abd Razak v. PP & Other Appeals (No 4)* [2022] 8 CLJ 393, the earlier panel pointed out in para. [21] that while the applicant and his counsel were physically present at the hearing, they "deliberately refuse to participate in the appeal hearing". What the court meant by this remark as the record will show is that the applicant's counsel, who had just taken over conduct of the case from the previous counsel barely three weeks earlier, refused to make any submission after his application for an adjournment of three to four months of the main appeals was refused by the court.

[90] Counsel representing the applicant at the time was Tuan Hj Hisyam Teh Poh Teik ("Hj Hisyam"), a senior and prominent member of the Bar with more than 40 years' experience behind him and who appears regularly in criminal matters in the Federal Court.

[91] The chain of events that led to counsel's refusal to submit on the main appeals and eventually to discharge himself from representing the applicant is well documented. The notes of proceedings show as follows, starting with the proceedings on 15 August 2022, which was the first day of the hearing of the main appeals:

Day 1 - 15.8.2022 (Monday)

(i) The court allowed all the 3 motions in Enclosures 229, 228 and 218 to amend the original motions to adduce additional evidence.

(ii) The court proceeded to hear the amended motions in 210, 31 and 32.

(iii) Hj Hisyam then proceeded to address the court on the motion to adduce additional evidence and for a declaration that the High Court trial was null and void due to a conflict of interest on the part of the trial judge Justice Mohd Nazlan bin Mohd Ghazali.

(iv) Dato' Sithambaram submitted in reply. Hj Hisyam asked that his reply be heard the next day, *ie*, 16 August 2022. The request was granted by the court.

Day 2 - 16.8.2022 (Tuesday)

(i) Dato' Sithambaram continued with his submissions, followed by Hj Hisyam's reply.

(ii) The court then delivered its decision to dismiss enclosures 210, 31, 32 as amended and ordered the main appeals to be proceeded with.

(iii) Hj Hisyam asked for an adjournment of the main appeals. The prosecution left the matter in the hands of the court. The application for adjournment was refused. The hearing of the main appeals was adjourned to 18 August 2022.

Day 3 - 18.8.2022 (Thursday)

(i) Hj Hisyam pleaded for the court to reconsider his application for an adjournment of the main appeals. In the event the adjournment was refused, he said he would discharge himself as counsel for the applicant as he was totally unprepared.

(ii) The Solicitor General Datuk Terrirudin bin Mohd Salleh who had just joined the prosecution team led by Dato' Sithambaram informed the court that he would leave it to the court.

(iii) Hj Hisyam asked the court to seriously consider his second plea that adequate time be given for him to prepare for the main appeals since there was no or no serious objection by the prosecution. He reiterated that he was not prepared to argue the main appeals. He admitted that he had not studied the appeal record as there were so many issues and he was only asking for 3 months and he would come back, point for point.

(iv) The court responded by saying that it had made a decision on the adjournment and there was no reason to review the earlier decision. Hj Hisyam's response was that he was not prepared and left it entirely to the court.

(v) The court delivered its decision on Hj Hisyam's decision to discharge himself as counsel for the applicant, which was to disallow the discharge.

(vi) On being queried by the court if he had anything to say on the 94 grounds of appeal Hj Hisyam told the court that he had nothing to submit. The court enquired whether he would be relying on the submissions filed in the Court of Appeal in relation to the findings of the High Court. Hj Hisyam replied in the affirmative.

(vii) The court then told the parties that since the case was of public interest, the court would invite the learned Deputy Public Prosecutor (DPP) to submit first, with a view to giving the applicant more time to prepare for the main appeals.

(viii) When proceedings resumed in the afternoon, Hj Hisyam told the court that he would like to verify his statement earlier in the morning when he said he would be adopting the submissions filed in the Court of Appeal. He explained that the correct position would be that the court could act on the record, and if given the opportunity he would like to make fresh submissions on behalf of the applicant and perhaps look at the petition of appeal and the amended petition. The court took note of the position.

(ix) The court asked Hj Hisyam to clarify what he meant earlier when he said that the court could act on the written submissions in the Court of Appeal and later saying that he would file a fresh submission and relook at the petition of appeal. Hj Hisyam replied that if given time, if given an adjournment, he would do so. He said without the adjournment, he could not participate in the hearing of the main appeals.

(x) The court stressed that the court would not adjourn the matter and proceeded to invite the learned DPP to submit first. Hj Hisyam was told that he would have taken notes and decide which area that he could respond when the learned DPP had finished with his submissions. Hj Hisyam again told the court that he was in no position to participate or take part in the proceedings. Dato' Sithambaram continued with his submissions.

Day 4 - 19.8.2022 (Friday)

(i) Dato' Sithambaram continued with his submissions and after he finished, the court adjourned hearing to the afternoon.

(ii) When the court resumed in the afternoon, Hj Hisyam asked the court if the hearing could continue on Thursday (the case was fixed on Tuesday) in the event the hearing could not be completed that afternoon. Dato' Sithambaram informed the court that he had finished with his submissions.

(iii) Hj Hisyam told the court that he had no submissions to make, not even oral submissions. He sought permission from the court if he could be excused on Tuesday as he would be saying the same thing.

(iv) The court gave Hj Hisyam 3 days (Saturday, Sunday and Monday) to prepare for the main appeals. The hearing was then adjourned to 23 August 2022.

Day 5 - 23.8.2022 (Tuesday)

(i) Hj Hisyam informed the court that he had filed an application for recusal of the learned Chief Justice (Enclosure 300). The court enquired whether Hj Hisyam would have anything to submit on the main appeals. He answered "no" except on the issue of his representation as counsel for the applicant. He asked to submit on the main appeals after the disposal of the recusal application. He then began to submit on the issue of representation and adjournment, followed by submissions in reply by the learned DPP.

(ii) Hj Hisyam informed the court that TS Shafee, who turned up in court, would take over on the issue of recusal. The court asked TS Shafee to submit on the merits of the application. TS Shafee asked for an adjournment to the following morning (24 August 2022) as he had just arrived from Parliament. The adjournment was refused and Hj Hisyam was then invited to submit on the recusal application.

(iii) Hj Hisyam told the court that he had nothing to submit on the recusal application. He then requested for another lawyer Dato' Firoz Hussein to speak. Dato' Firoz addressed the court by saying that he needed to take instructions on the issue and therefore asked for an adjournment.

(iv) The court refused to hear submissions from anybody else. The court then delivered its decision on the recusal application, which was to dismiss the application. The learned Chief Judge of Sabah and

Sarawak on behalf of himself and on behalf of the other members of the panel in a separate judgment concurred with the learned Chief Justice.

(v) Hj Hisyam made a request for the court to allow the applicant to make a statement and to say something to the panel.

(vi) The request was granted and the applicant proceeded to read his statement from the dock, after which the court delivered its decision on the main appeals, dismissing them and affirming the decision of the High Court as affirmed by the Court of Appeal.

[92] In his impassioned plea for an adjournment of the main appeals to be granted for three to four months earlier, this is what Hj Hisyam had to say ("HT" stands for Hj Hisyam, "CJ" for the Right Honourable the Chief Justice and "DS" for Dato' Sithambaram, the learned Deputy Public Prosecutor):

HT: My ladies, My Lords, as far as the main appeal is concerned, we're asking for an adjournment on the ground that I'm not prepared. I took this brief, or I agreed to take this brief on the 21/07/2022. *And from the time I took the brief until today, I worked very hard on the arguments with respect of the motion*. I request for time because we'd like to come back again to argue the same appeal, with the same amount of passion and sincerity. *I ask for time, it's not the Appellant's fault, it's mine*. When I took the brief, I am aware that this case is set down for hearing on the 15th. I'm also aware of the rules of the evidence. But I was hopeful and consciously confident that the reasons I advance are valid, are strong, to urge this Court to exercise discretion in our favour. *Give me sufficient time to prepare for the main appeal. My Ladies, My Lords, in this case, I've been informed there are about 179 volumes of the appeal record. Altogether about seven (sic) witnesses has been called. Judgments of both the High Court and the Court of Appeal consist of about more than 1000 pages. ... This is no ordinary appeal*. I need plenty of time in which to really. I say, My Ladies, My Lords, I've been in practice about four and half decades. I normally do not come to this Court, or any other Court, to ask for an adjournment unless it's absolutely necessary. And this is one such things. There are strong points of law we argue, serious arguments have to be canvassed by the Appellant and the Respondent. *And I'd also like to add that the application I make now, is made in good faith. It's a bona fide application for an adjournment. Why I say bona fide? When we took the brief on 21/07/2022, we had the first case management on 29/07/2022. Indications given to us by the learned DPP that this case will not be adjourned. We did not come to Court empty handed. We took the message from the Federal Court, we underwent a lot of work in the preparation of the arguments. My Ladies, My Lords can see the number of authorities we cited, the number of submissions we made, and these are strong arguments, bona fide arguments. So, it's not a question of to purposely delay the hearing of this main appeal*. I'm also, when I took this case, I was also motivated by the case of Anwar Ibrahim, where I cited earlier on, where there's a clash of interest

between finality and fairness and justice. I applied this case in my mind, and in this case there's a clash of interest between expeditious trial and appeal, on one hand, and fairness and justice on the other. I look back at the history of this case. The conviction in the Court of Appeal was sometime in December 2021. And the appeal came up eight months later. And I thought to myself, if I were to come before My Ladies and My Lords and ask for at least another three or four months, *and the Court allows me that three or four months, it means that this appeal is heard one year after the decision, final decision of the Court of Appeal, which is not too long under the circumstances*. I've seen with my own eyes, My Ladies, My Lords, where in other appeals, a lawyer stands up and says, "I've just been retained", and this Court allows the adjournment. Or the accused comes to the Court, raises his hand and says, "I want to change a lawyer", adjournment was granted under the circumstances. *We ask for the same treatment, equal protection, equal opportunity, there must be ample opportunity given for the accused person because these are serious charges and this is the final lap, regard to this appeal*. So, on these grounds, My Ladies, My Lords, I plead with all sincerity in me, I plead that justice be seen to be done, I plead that adequate opportunity be given to me and my team to do a good job, to come back again and argue the points that are relevant. *There are about more than 90 grounds in the petition, we'd like to look at the petition again, perhaps remodel that, so that we focus on a few main points, so that judicial time can be saved. And this is the first time in my carrier that I plead so hard to give us another chance for time which I'm most grateful*.

CJ: Yes, prosecution?

DS: Yang Amat Arif-Yang Amat Arif, Yang Arif-Yang Arif. The Court in this appeal is fully conversant with the facts and circumstances of this case. My learned friend has, from the time in the two case managements and letters from the Court, has been duly informed that this case would proceed on the appointed days. And all the facts are before, it's now a question of – I have nothing new to add, all facts are before the Court and the two CMs, I – *the prosecution leaves this matter in the hands of the Court*. That's all we can say, because the facts are before, and the Court has already rejected twice, so, what does the Court do now is something, a discussion in the hands of this honourable Court. That's all I'll say. Thank you.

(emphasis added)

[93] The words in bold make out the reasons given by counsel for asking for an adjournment of the main appeals. So, despite putting his best argument forward in trying to persuade the court to grant an adjournment of the main appeals, it came to nothing as it was rejected by the court.

[94] Before us, Tan Sri Muhammed Shafee Abdullah ("TS Shafee") who has now taken over as counsel for the applicant from Hj Hisyam emphasised the point that when Hj Hisyam applied for the three to four months adjournment of the main appeals, he openly admitted that the fault was his

A and not the applicant for accepting the brief at such late stage, but was motivated by his belief that his request for an adjournment was reasonable considering that it had not even been a year since the decision of the Court of Appeal was delivered, and that based on his four and half decades in practice, it was not unusual for courts to grant adjournments on the basis that
B counsel had just been appointed and/or discharged notwithstanding that the matter had been fixed for hearing.

[95] Counsel also emphasised the point that when Hj Hisyam applied for the adjournment, there was no objection by the prosecution. In fact, and this is not disputed, the Solicitor-General Datuk Terrirudin Mohd Salleh who
C appeared personally on the morning of 18 August 2022 to join the prosecution team led by Dato' Sithambaram did not object to the request for adjournment by leaving it to the court. The stand taken by the Solicitor-General must be taken as the stand taken by the Attorney-General himself, who is also the Public Prosecutor.

D **[96]** As is clear by now, the reason why Hj Hisyam discharged himself from representing the applicant was because he was totally unprepared to argue the main appeals, which involved some 30,000 documents to go through. He was only prepared to argue the motion to adduce additional evidence and for a declaration that the trial before the High Court was null and void due to a
E conflict of interest on the part of the trial judge Justice Mohd Nazlan bin Mohd Ghazali. The motion was fixed for hearing on the same day as the hearing of the main appeals. Be that as it may, he managed to present his submissions on the motion, which according to the applicant shows that he was not totally unprepared to handle the entire case after accepting the brief
F one week earlier on 21 July 2022. His total lack of preparation was only in respect of the main appeals.

[97] Hj Hisyam was surprised that his decision to discharge himself from representing the applicant was also not allowed by the court. The reason given by the court was that the discharge if allowed would leave the applicant
G with no legal representation. It was held that in criminal proceedings, leave must first be obtained before counsel can discharge himself from representing the accused person. He was then told to remain in court as counsel on record for the applicant. In other words, he was forced to act as counsel for the applicant.

H **[98]** In his affidavit in support, the applicant averred that it was rather absurd and ironic for the court to disallow his counsel to discharge himself (and therefore leaving him with no legal representation) when having counsel who was not prepared was no different from having no legal representation at all. I shall revert to this issue later in this judgment.

I **[99]** The contention was that Hj Hisyam did the right thing by asking for time to prepare for the main appeals as he would be doing injustice to the applicant if he had proceeded to submit without adequate preparation, given

the seriousness and complexity of the case. However, the court did not accept such reason as a valid ground for the grant of an adjournment. The court's reasons are found in para. [21] of the grounds of judgment which is reproduced again below for ease of reference:

> [21] In fact, the appellant having been aware of the dates fixed for hearing elected to discharge his former solicitors and appoint Messrs Zaid Ibrahim and Tuan Hj Hisyam Teh as his solicitors and counsel respectively. This is his right to do so but he cannot, after having made that decision, turn around and say that his lawyers are not ready to proceed with the hearing of the appeals. The new lawyers too, after having accepted the brief, are not entitled to say they need more time to prepare knowing fully well that the dates had been fixed well in advance.

[100] It was submitted that if at all any blame is to be attributed to anyone, it should be to his lawyers and not the applicant. In my humble opinion, that is a fair statement to make. There is no justification to make the applicant pay such a heavy price, as the price that he is paying now, for his lawyers' mistakes.

[101] To avoid any misperception, I must make it absolutely clear that I am not expressing any opinion, let alone any judgment on the propriety of Hj Hisyam's decision to discharge himself after accepting the brief on such short notice and being unable to argue the main appeals for want of preparation. That must be left for the relevant authority to determine. The court could have cited him for contempt or referred him to the Disciplinary Board of the Bar Council but apparently the court did not consider that option to be viable. We were told that the Bar Council has commenced action against Messrs ZIST and Zaid Ibrahim as well as Hj Hisyam. But that has nothing to do with the applicant whose only interest is to see that his lawyer acted in his best interest, nothing more nothing less.

[102] What is pertinent to note in the whole scheme of things is that there was no allegation, proven or otherwise, that the seeking of an adjournment of three to four months was a ploy or strategy by the applicant to delay the hearing of the main appeals. Importantly, there was no allegation that the change of solicitors and counsel by the applicant was to achieve that improper purpose. In fairness to the panel, it did not say so in its judgment. In fact, the court gave entirely different reasons for disallowing the adjournment, which essentially was that enough time (four months) had been given to the applicant and his lawyers to prepare for the main appeals.

[103] It was only at the hearing of the present application that the allegation was pursued with vigour by the learned DPP. The contention was that the application for adjournment was "a strategy that backfired" for the applicant when his motion to adduce additional evidence and for the nullification of the High Court trial was dismissed on 16 August 2022.

[104] With all due respect to the learned DPP, I do not think it is open for the prosecution to take that position now, having taken a contrary position at the time the applications for adjournment were made on 16 August 2022 and on 18 August 2022. They cannot be allowed to approbate and reprobate (*Express Newspapers Plc v. News (UK) Ltd* [1990] 1 WLR 1320). The application for an adjournment of three to four months by the applicant must therefore be taken to have been made in good faith and not a ploy or strategy by him to delay the hearing of the main appeals as alleged by the prosecution.

[105] That will be the starting point in determining whether the application for review should be allowed in terms of Motion No. 2, *ie*, that the application for adjournment by the applicant was made in good faith and not to delay the hearing of the main appeals.

[106] It was the contention of the learned DPP that the decision by the earlier panel to refuse an adjournment is non-reviewable as it goes to the merits and therefore falling outside the scope of r. 137. I am unable to accede to the argument. The merits of the earlier panel's decision is not the issue. The issue is whether the decision by the earlier panel to refuse an adjournment of the main appeals had resulted in injustice to the applicant. This falls squarely within the purview of r. 137 of the Rules, one of which is "to prevent injustice".

[107] The learned DPP cited the Federal Court case of *Halaman Perdana Sdn Bhd & Ors v. Tasik Bayangan Sdn Bhd* [2014] 3 CLJ 681; [2014] 4 MLJ 1 for the proposition that the Federal Court cannot review its own decision to refuse to grant an adjournment as it is an exercise of discretion by the court. It is clear that the basis for the decision in that case was an exercise of discretion by the court. The following passages in the judgment, amongst others, were reproduced by the learned DPP:

> [20] We now turn to prayer B of the motion. Basically it is for the rehearing of the leave application. But in doing so the applicants sought to impugn the two decisions of the learned judges of this court who heard the leave application. The first decision was the refusal to grant an adjournment and the second decision was the dismissal of the leave application itself.
>
> [21] As regards the prayer to set aside the first decision we are of the view that it was obviously not within the ambit of r. 137. The grant or refusal of an adjournment was entirely an exercise of discretion by the learned judges who heard the leave application.

[108] It is a principle of great antiquity that the decision whether to allow or to disallow an adjournment is at the discretion of the court. *Halaman Perdana* merely restates this trite principle of law and applying it to the facts of the case. But what is also trite law is that the discretion must be exercised judiciously and not capriciously or arbitrarily. I do not think it is necessary for me to cite any authority for this proposition of law.

[109] In any case, it has never been the law that an adjournment must be granted as a matter of course or as a rule of thumb where the opposing party does not object to the request for adjournment or engages an incompetent or unprepared lawyer at the eleventh hour. First of all, an adjournment is not a right and secondly, as I have just mentioned, whether or not to grant an adjournment is at the discretion of the court, to be exercised judiciously and not capriciously or arbitrarily. A judicious decision is a decision that is well-considered; discreet; wisely circumspect: see *Black's Law Dictionary* (Deluxe 6th edn) A discretion that is not exercised judiciously is not a valid exercise of discretion and is liable to be set aside.

[110] The case of *Halaman Perdana* relied on by the learned DPP must be confined to its own peculiar facts and circumstances. It is fact centric and has no semblance to the facts obtaining in the present case. The distinguishing feature is that a postponement was asked for in that case because there was a pending leave application in the Court of Appeal. The context in which the adjournment issue became relevant in that case can be gauged from the following paragraphs of the judgment:

> [17] Notwithstanding the foregoing, it remains the law that where the Court of Appeal is the apex court of any particular case in view of s. 87 of the Courts of Judicature Act 1964 ('CJA') then it is also clothed with such inherent power. (See: *Harcharan Singh Piara Singh v. PP* [2011] 6 CLJ 625).
>
> [18] As such, the COA review application was an incompetent application *ab initio*. The COA was not the apex court in this case. There was therefore no basis in law for the applicants to complain that this court erred in not allowing the adjournment of the leave application pending the disposal of the COA review application.
>
> [19] Hence, prayer A of the motion is a non-starter and an abuse of the process of the court. It is therefore refused.

[111] The facts of the case are clearly poles apart from the facts of the present case, where the issue is whether the earlier panel's refusal to grant an adjournment of three to four months for the hearing of the main appeals despite the *bona fide* of the application had the effect of defeating the applicant's rights altogether, thereby occasioning a miscarriage of justice and a breach of art. 5(1) of the Federal Constitution, which reads:

> Article 5. Liberty of the person
>
> (1) No person shall be deprived of his life or personal liberty save in accordance with law.

[112] It is important to appreciate that it is not the exercise of discretion by the earlier panel *per se* that is in issue. It is accepted that the panel had the discretion whether to grant or not to grant an adjournment. The issue is whether the exercise of the discretion had deprived the applicant of his right to a fair hearing of the main appeals.

[113] It was the applicant's contention that his right to a fair hearing was altogether defeated when the court proceeded to hear the main appeals and to deliver its decision on the same day in spite of the fact that he was, for all practical purposes, not legally represented after his counsel discharged himself. His counsel's mere presence in court did not change anything as he refused to take part in the proceedings. Furthermore, the applicant was not asked if he wished to say anything before the court proceeded to call learned DPP to submit.

[114] The procedure at the hearing of a criminal appeal is prescribed by s. 313 of the Criminal Procedure Code ("the CPC"), which provides as follows:

> **Procedure at hearing**
>
> 313. (1) When the appeal comes on for hearing **the appellant, if present, shall be first heard in support of the appeal**, the respondent, if present, shall be heard against it, and the appellant shall be entitled to reply.
>
> (2) If the appellant does not appear to support his appeal the Court may consider his appeal and may make such order thereon as it thinks fit:
>
> Provided that the Court may refuse to consider the appeal or to make any such order in the case of an appellant who is out of the jurisdiction or who does not appear personally before the Court in pursuance of a condition upon which he was admitted to bail, except on such terms as it thinks to impose. (emphasis added)

[115] Thus, the order of proceedings is that the appellant must ("shall") be heard first, followed by the respondent. The appellant may then be heard in reply, after which the court may make such order in the matter as to it may seem just.

[116] This statutory procedural requirement was not followed by the court. Instead of hearing the applicant first, who was present, the court invited learned DPP to submit first, who then took two full days to submit. The reason why the panel took this unusual course of action was because the applicant's counsel refused to submit despite being invited to do so, and not because the applicant did not appear to support his appeal. Counsel's refusal to submit was equated by the court as non-appearance by the applicant or his advocate to support his appeal.

[117] With the greatest of respect to the panel, this is surreal because the applicant and his advocate were in fact physically present in court. Given the fact that the applicant's counsel (assuming he was still counsel for the applicant after his discharge) refused to submit, what the court should have done in the circumstances was to invite the applicant to speak first before inviting the learned DPP to submit. But this was not done, in breach of s. 313(1) of the CPC.

[118] Learned counsel for the applicant described the procedure adopted by the earlier panel as akin to the procedure to be followed in an *ex parte* application where only one side is heard in the absence of the other party. It was submitted that in effect the earlier panel had converted what should have been an *inter parte* argument in a criminal appeal into an *ex parte* criminal proceeding.

[119] What becomes clear from this episode is that the prosecution was heard for two full days whereas the applicant was not heard at all. Any which way one looks at it, the end result was that the court only heard one side. In other words, the applicant's right to be heard was compromised, in breach of the *audi alteram partem* rule.

[120] A number of authorities were cited by the applicant in support but I shall only refer to five of them. In the old English case of *Maxwell v. Keun And Others* [1926] 1 KB 645 Lord Atkin held that the courts had a duty to review where an order is made to defeat the rights of the parties altogether. This is what His Lordship said at p. 653:

> I quite agree the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does so; *but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the Court has power to review such order, and it is, to my mind, its duty to do so*. (emphasis added)

[121] The *ratio decidendi* of the case is clear. If it appears that the result of the decision complained of was to defeat the rights of the parties altogether, it is the duty of the court to review the decision. The principle applies in the present application for review as the issue before the court is whether the result of the decision by the court to refuse an adjournment and to proceed with the hearing of the main appeals was to defeat altogether the right of the applicant to a fair hearing.

[122] For purposes of determining the issue, no distinction should be drawn between a trial and an appeal in an application for review under r. 137 as the hearing of the main appeals by the earlier panel, which is the subject matter of the present application, was by way of rehearing, which was a continuation of the trial. This is not to treat the application as if it is an appeal but to determine if the impugned decision had resulted in injustice to any party. In the Court of Appeal case of *Ishak Hj Shaari v. PP* [2006] 2 CLJ 325; [2006] 3 MLJ 405 Gopal Sri Ram JCA (as he then was) said:

> [10] In the third place, counsel's argument overlooks that in the word 'trial' in the context of r. 76, having regard to its purpose *includes an appeal*. As a matter of pure principle, it has been held in a number of decisions concerning criminal cases that *an appeal is part of the trial of an offence or a mere continuation of it. In Queen-Empress v. Jabanulla (1896) 23 ILR 23 Cal. 975 at p 977, O' Kinealy J said that an appeal 'is not a second trial, but only a*

continuation of the first trial.' This view was followed in the case of *Re Bali Reddy* (1913) ILR 37 Mad 119 where the accused had been charged for murder and rioting but had been convicted by the sessions court for offences under ss. 304 and 147 of the Indian Penal Code. In dealing with the contention that the appeal was a fresh proceeding, the court comprising of Benson and Sundara Avar JJ said, *'the present appeal is not a second trial but a continuation of the trial in the sessions court.' Lasly in Bansi Lai v. Emperor (1907) 12 CWN 438, the court held that an appeal is part of the trial of an offence*.

[11] There is one further case of interest that supports the point we make. In *Ranjit Singh v. State* AIR 1952 HP 81, it was argued that those provisions in the Criminal Procedure Code which empower the High Court to reverse an acquittal or act in revision to the prejudice of an accused offended the *autrefois acquit* and *autrefois convict* principle embodied in the Indian Constitution. The court in rejecting this contention said that:

> an accused cannot be said to have been convicted or acquitted as a result of a judgment passed in the course of 'prosecution and punishment' if that judgment is still open to appeal to a court of higher jurisdiction. *It has therefore been held under the corresponding provisions of s. 403 of the Code that an appeal is not a second trial but only a continuation of the trial in the sessions court*. (emphasis added)

[123] In *Maxwell* (*supra* at [61]) the plaintiff was an officer in the army who was then serving in India. He made applications to the Lord Chief Justice, which were refused, to allow both actions to be adjourned in order to enable him to obtain leave from the army to return to England for the hearing. Trial proceeded and that led to the appeal, which was ultimately granted. At p. 657 Lord Atkin said:

> *The result of this seems to me to be that in the exercise of a proper judicial discretion no judge ought to make such an order as would defeat the rights of a party altogether, unless he is satisfied that he has been guilty of such conduct that justice can only properly be done to the other party by coming to that conclusion*. I am very far from being satisfied that that is so in this case; on the other hand, I am quite satisfied that very substantial injustice would be done to the plaintiff by refusing the application that this case should be postponed and that that is the result of the present order. (emphasis added)

[124] The relevance of the authority to the present application is that the grant of an adjournment of three to four months, of the hearing of the main appeals would not cause any injustice to the prosecution as they had no objection to the request for adjournment. In other words the prosecution accepted that a break of three to four months for the hearing of the main appeals would not cause them any prejudice. There is therefore no question of the applicant being, in the words of Lord Atkin "guilty of such conduct that justice could only properly be done to the other party by coming to that conclusion." Surely it cannot be suggested that the prosecution by not objecting to the adjournment was in cahoots with the applicant to delay the hearing of the main appeals.

[125] On the other hand, very substantial injustice would be caused to the applicant by the refusal to grant an adjournment as he would be left without legal representation at the hearing of the main appeals. He could not be said to have legal representation when counsel of his choice was unwilling to represent him any further. A forced representation is no representation at all, especially where, as in this case, counsel refused to take part in the hearing of the main appeals. That is common sense. Obviously the applicant was in no position to argue the appeals himself, despite being a former Prime Minister. I do not think that is a point for argument. The fact is, he was clearly disadvantaged. As the High Court of Australia said in *Dietrich* (*supra* at [17]) at p. 282:

> *An unrepresented accused is disadvantaged, not merely because almost always he or she has insufficient legal knowledge and skills, but also because an accused in such a position is unable dispassionately to assess and present his or her case in the same manner as counsel for the Crown (Mclnnis (supra) per Murphy J at 590).*

[126] At p. 289, the court explained the position in Australia:

> *The decision whether to grant an adjournment or stay is to be made in the exercise of the trial judge's discretion, by asking whether the trial is likely to be unfair if the accused is forced or unrepresented. For our part, the desirability of an accused charged with a serious offence being represented is so great that we consider that the trial should proceed without representation for the accused in exceptional cases only. In all other cases of serious crimes, the remedy of an adjournment should be granted in order that representation can be obtained.* (emphasis added)

[127] I see no reason why we should not adopt the Australian position as part of our law. In the context of the present case, the question for the earlier panel to ask was whether going ahead with the hearing of the main appeals was likely to be unfair to the applicant when he was not legally represented. There is no question that he was charged with serious offences. At p. 292 the court in *Dietrich* came to this conclusion:

> In view of the differences in the reasoning of the members of the court constituting the majority in the present case, it is desirable that, at the risk of some repetition, we identify what the majority considers to be the approach which should be adopted by a trial judge who is faced with an application for an adjournment or a stay by an indigent accused charged with a serious offence who, *through no fault of his or her part,* is unable to obtain legal representation. *In that situation, in the absence of exceptional circumstances, the trial in such a case should be adjourned, postponement or stayed until legal representation is available. If, in those circumstances, an application that the trial be delayed is refused and, by reason of the lack of representation of the accused, the resulting trial is not a fair one, a conviction of the accused must be quashed by an appellate court for the reason that there has been a miscarriage of justice in that the accused has been convicted without a fair trial.*
>
> (emphasis added)

[128] That was a case where the accused was unable to obtain legal representation unlike the case before us where the applicant had obtained legal representation but his counsel discharged himself. However, I do not think the difference in the factual matrix of the case is of any significance as in both cases there was no legal representation at the trial (in the case of the accused) and at the hearing of the appeals (in the case of the applicant).

[129] What the case demonstrates is the importance of an accused person to be legally represented to guarantee the fairness of his trial or appeal process. It is only in exceptional cases that the trial or appeal should proceed without legal representation. In the present case, nothing exceptional has been shown to justify the hearing of the main appeals without legal representation for the applicant.

[130] The principle in *Maxwell* (*supra* at [61]) was further developed by the English Court of Appeal in *Dick v. Piller* [1943] AC 627. In that case, the trial judge refused to grant an adjournment on the basis that the defendant's medical certificate to support his reason for being absent at the trial was not substantiated by an affidavit to support his application for adjournment. Croom-Johnson J held at p. 634 that in considering an application for adjournment the court must consider whether a miscarriage of justice would have been occasioned if the adjournment was granted:

> On the question whether there has been a wrong exercise of discretion, a number of authorities were cited to us. In view of the passages from the judge's notes, to which I have already referred, I feel sure that the judge must have taken into consideration statements which, on fuller examination, turn out to be accurate. He had apparently made up his mind on September 16, long before any question of illness arose, to proceed with the trial in the absence of the defendant at the adjourned hearing, even if the defendant were absent. *I cannot believe that the judge applied his mind of the possibility of an injustice resulting from the case being decided without the defendant's evidence. Had he done so he must, I think, have come to one conclusion only. He would then have had to consider whether a miscarriage of justice might arise to the plaintiff if an adjournment were granted. I can find no trace of these points being considered or even discussed, whether an award of costs would not meet the case*. (emphasis added)

[131] Similarly in the present case the court in refusing to allow the application for adjournment did not appear to have applied its mind to the question whether a miscarriage of justice would have been occasioned to the prosecution if the adjournment was granted and whether conversely it would have such effect on the applicant if it was not granted. There is nothing in the grounds of judgment to indicate that the point had been considered or even discussed.

[132] In *Hup San Timber Trading Co Sdn Bhd v. Tan Ah Lan* [1978] 1 LNS 66; [1979] 1 MLJ 238, the Federal Court held that where a judge is in doubt as to the real reason behind the inability of the appellant to attend court, an adjournment should have been allowed to enable both parties to be given an

opportunity to be heard. In that case, the trial judge suspected that the failure by the accused to attend court was to avoid the hearing. Wan Suleiman FJ said:

> The learned judge "strongly suspected" that the medical certificate and the absence of Mr Lai on the day of the trial was not just coincidence. He had formed his suspicion because of what counsel for the respondent had stated, it would appear, from the Bar. It seems that in another case in Johore Bahru, Mr Lai had failed to attend court on the date of hearing, advancing as an excuse the fact that he had been barred *ie*, by the immigration authorities from entering this country, in consequence of which evidence *de bene esse* was taken from him in Singapore and adduced in evidence.
>
> We are unable to understand exactly why the learned judge subsequently proceeded under Order 36 r. 31, because at page 24 of the Grounds it looks very much as if he had two possibilities for Mr. Lai's absence in mind *viz*. (i) he was really indisposed as stated in the medical certificate or (ii) he had difficulties with the immigration authorities and therefore was unable to enter this country.
>
> We would with respect say that either of these reasons would be sufficient grounds for an adjournment of the hearing.
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> ...
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> No doubt failure by appellant to obtain a medical certificate containing the appropriate information in a form so prescribed as to remove suspicion that he was trying to delay proceedings has inclined learned trial judge to allow this rather drastic measure. But it seems to us that in this instance the judge was in some doubt as to the real reason behind his inability to attend court. **On occasions of doubt such as the present one the guiding principle should be that both parties should be given an opportunity to be heard**. Any delay occasioned by what appears to be an inadequate reason for absence can be compensated by an award of appropriate costs. (emphasis added)

[133] In the present case, the question of the court doubting or "suspecting" the real reason for the application for adjournment did not arise. There is no such suggestion in the grounds of judgment. The main reason for refusing the application was because the court could not accept unpreparedness of counsel as a ground for granting an adjournment, apart from the need to give priority to cases of this nature as required by the Chief Justice Practice Direction No. 2 of 2003 and to avoid unnecessary expenses.

[134] In *Mohanlal Gordhandas Sheth v. Ban Guan & Co* [1955] 1 LNS 74; [1956] 22 MLJ 13, an appeal against an interlocutory order in refusing an adjournment was allowed. In so deciding, the court held that "an injustice may occur if the appellant is deprived of his right to defend a suit" where his counsel did not have the material before him upon being instructed to apply for an adjournment but was refused and the matter had proceeded to

A trial despite the learned judge having every reason to believe on the material before him that the appellant had known of the date of hearing several weeks previously.

[135] In *Lee Ah Tee v. Ong Tiow Pheng & Ors* [1984] 1 CLJ 26; [1984] 1 CLJ (Rep) 187; [1983] 1 MLJ 10, although the Federal Court disallowed the application for adjournment it held as follows:

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> The discretion of the judge to allow or refuse an application for adjournment was a subject dealt with in depth by the Court of Appeal in *Dick v. Piller* [1943] 1 All ER 627. We agree to and adopt the following principles as regards the discretion in allowing or refusing an adjournment:
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> C
>
> (1) Whether or not a party should be granted an adjournment is wholly at the discretion of the Judge. He would exercise the discretion solely upon his view of the facts;
>
> (2) *Prima facie* this discretion is unfettered;
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> D
>
> (3) *The question to ask in any particular case is whether on the facts there are adequate or sufficient reasons to refuse the adjournment*;
>
> (4) Although an appellate court has power to interfere with the Judge's decision in regard to the granting of an adjournment, it would refrain from doing so *unless it appears that such discretion has been exercised in a way which tended to show that all necessary matters were not taken into consideration or the decision was otherwise arbitrarily made*;
>
> E
>
> (5) An appellate court ought to be very slow to interfere with the exercise of the discretion. *But if it appears that the result of the order made below would be to defeat the rights of the parties altogether or that there would be an injustice to one or the other of the parties then the appellate court has power and indeed a duty to review the exercise of the discretion*.
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> F
>
> (emphasis added)

[136] Paragraph (5) above is an adoption by the Federal Court of the principle laid down by Lord Atkin in *Maxwell* (*supra* at [61]). The principle has therefore become the law of this country, which is, if it appears that the result of the order made below would be to defeat the rights of the parties altogether or that there would be an injustice to one or other of the parties, then the appellate court has power and indeed a duty to review the exercise of the discretion. The principle applies and there is no legal basis nor precedent that I am aware of which says that it only applies to appellate courts hearing appeals from the lower courts and not to a court hearing an application for review under r. 137. It must be kept in mind that r. 137 is there "to prevent injustice or to prevent an abuse of the process of the court." Effect must be given to the legislative intent of the provision.

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[137] The cases it will be noted are all civil cases, where the consequences are far less serious than in criminal cases where the stakes are high, such as the present case where the applicant had 12 years of imprisonment hanging over his head in addition to a colossal fine of RM210 million, in default another five years imprisonment.

I

[138] What the cases highlight is the need for the court to strike a balance between the interests of the parties in deciding whether to allow or to refuse an application for adjournment. Whatever may be the considerations, it must not defeat the rights of the parties altogether or to result in injustice to any party, technicalities aside. It is true that the cases are not cases on review under r. 137 of the Rules but the underlying principle is that the decision must not result in injustice to any party, which is what r. 137 is meant to remedy.

[139] In the present case, I am constrained to agree with the applicant that his right to a fair hearing was altogether defeated when the court decided to go ahead with the hearing of the main appeals in spite of the fact that he was not legally represented after his counsel Hj Hisyam discharged himself. At the risk of repetition, the fact that counsel remained in court (as directed by the court) does not change the equation as the applicant was still without legal representation in the real sense of the word as counsel refused to take further part in the proceedings. In that situation, an adjournment would have been in order to enable the applicant to engage another counsel or alternatively to give his counsel Hj Hisyam sufficient time to prepare for the main appeals, bearing in mind the application for adjournment was not to scuttle the hearing of the main appeals. It was done in good faith by a lawyer who had just been retained three weeks earlier to represent the applicant.

[140] It cannot be doubted that a criminal trial is most fairly conducted when both the prosecution and defence are represented by competent counsel: see *Dietrich* (*supra* at [16]). In *Dietrich*, the accused was unable to obtain legal representation and for that reason alone he was ordered to be acquitted on appeal on the ground that there had been a miscarriage of justice in that he had been convicted without a fair trial.

[141] If inability to obtain legal representation can be a ground for quashing a conviction, as in *Dietrich*, *a fortiori* it should also be a ground for quashing a conviction where the accused was unrepresented by counsel, as in the present case where the applicant was without legal representation when the main appeals were heard and decided by the court of final appeal, thus causing a miscarriage of justice.

[142] In *State (Healy) v. Donoghue* [1976] IR 325 O'Higgins CJ of the Supreme Court of Northern Ireland expressed a similar sentiment when he said at p. 350:

> The general view of what is a fair and proper in relation to criminal trials has always been the subject of change and development. Rules of evidence and rules of procedure gradually evolved as notions of fairness developed. **The right to speak and to give evidence, and the right to be represented by a lawyer of one's choice were recognised gradually**. Today many people would be horrified to learn how far it was necessary to travel in order to create a balance between the accuser and the accused.
>
> (emphasis added)

[143] The right to counsel would be illusory if it precludes the right of counsel to be heard. Justice Sutherland of the United States Supreme Court said in *Powell v. Alabama* (1932) 287 US at p. 68 that the right to be heard would, in many cases, be of little avail if it did not comprehend the right to be heard by counsel.

[144] In *Strickland v. Washington* (1984) 466 US 668 the same court held that the right to counsel is to be strictly defined as being the right to be represented by an effective counsel. A violation of the right to effective representation would occur where the defendant's choice is wrongfully denied. See the United States Supreme Court case of *United States v. Gonzalez-Lopez* (2006) 548 US 140.

[145] In the present case, in failing to consider the risk of prejudice to the applicant by denying his counsel an adjournment in order to give him sufficient time to prepare for the main appeals, the earlier panel with the greatest of respect had denied the applicant of his right to be represented by an effective counsel. It cannot then be said that he had the services of an effective counsel when his counsel was shackled from representing him effectively for want of preparation, which forced him to discharge himself, which was also denied.

[146] The learned DPP argued that the earlier panel made the right decision to refuse an adjournment applied for by Hj Hisyam as he had four months to prepare for the main appeals. That is not entirely correct. In fact it is factually wrong. The period of four months was good for Shafee & Co but not for Hj Hisyam who took over conduct of the case from Shafee & Co only on 21 July 2022. This gave him only about three weeks to prepare for the main appeals which were already fixed for hearing on 15 August 2022 to 26 August 2022, which were also the dates allocated by the court for the hearing of the motions, including the motion to adduce additional evidence and for a declaration that the High Court trial was a nullity due to a conflict of interest on the part of the trial judge Justice Mohd Nazlan bin Mohd Ghazali. As I mentioned earlier, despite the time constraints, Hj Hisyam managed to present his submissions for the motion on the first day of hearing on 15 August 2022. This effectively rebuts any allegation that the change of counsel was to delay the hearing of the main appeals. If that had been the intention, it would have been more prudent for Hj Hisyam to also apply for an adjournment of the motions as well. But he did not.

[147] In any event, the question to ask is not whether the court made the right decision in refusing to allow an adjournment. The right question to ask is whether the decision had caused injustice to the applicant. There is a difference between making a right decision and a decision that causes injustice to any party. The difference is like doing the right thing and doing it right.

[148] But more importantly, it would be grossly unfair to make the applicant suffer the consequences of his lawyer's fault in accepting the brief knowing that he was only prepared to argue the motion to adduce additional evidence and to declare the High Court trial a nullity but not the main appeals. The undisputed fact is that the applicant was given a firm assurance, in absolute terms in fact, by his new lawyers including Messrs Zaid Ibrahim Suflan TH Liew & Partners (Messrs ZIST) that an adjournment of the case would be granted by the court for the new team to prepare. It is also an undisputed fact that this was the first time the applicant changed his solicitors and counsel since his trial began in the High Court on 3 April 2019. His record does not show that he was in the habit of changing counsel, let alone changing counsel to delay the proceedings. The applicant cannot be faulted for listening to his lawyers' advice.

[149] The point was also missed that before changing his solicitors and counsel from Messrs Shafee & Co to Messrs ZIST with Hj Hisyam as lead counsel, the applicant's desire was to engage a Queen Counsel (QC) to work together with TS Shafee in the final lap of his final appeal after losing his battles in the High Court and in the Court of Appeal. This was not a mere puff by the applicant as he had indeed applied to obtain an *ad hoc* licence for the QC to appear as his counsel in the main appeals. But unfortunately for him, the application was dismissed by the Kuala Lumpur High Court on the ground that the lawyer from England could not speak Bahasa Malaysia.

[150] It was only after his application for an *ad hoc* admission of the QC was dismissed that the applicant engaged Messrs ZIST with Hj Hisyam as lead counsel to replace Messrs Shafee & Co. According to the applicant, the QC had been paid in full and he would have gone on with him on the hearing dates of 15 August 2022 to 26 August 2022 had it not been for the High Court's refusal to grant the QC leave to appear as counsel. This was not disputed by the prosecution. Therefore, the appointment of the new set of solicitors and counsel was necessitated by the refusal of the High Court to grant an *ad hoc* admission to the QC and not to delay the hearing of the main appeals.

[151] In the chronology of events that I have set out earlier in this judgment, the applicant was allowed by the court to make a statement at the tail end of the proceedings on 23 August 2022, minutes before he was escorted to prison to serve his sentence. There was no objection raised by the prosecution for the inclusion of this statement in the record of proceedings. Nor was there any objection when it was read out in open court by learned counsel for the applicant at the hearing of this application. It therefore forms part of the record for purposes of this review application.

[152] Although it was too late in the day, the applicant pleaded yet again, this time personally since his counsel had discharged himself, for him to be given time to prepare for the main appeals. This time he bargained for a

shorter adjournment period of two months instead of the three to four months requested for by his counsel Hj Hisyam before he discharged himself. The request was rejected and the court proceeded to deliver its decision dismissing his appeals.

[153] The statement that the applicant gave from the dock is a manifestation of his disappointment with the way his appeals were handled by the court. He did not feel that he has had a fair hearing (*Kiew Foo Mui & Ors* (*supra*) at [16]). The following passages in the statement, so far as they are relevant to the issue of adjournment, bear this out. A little bit lengthy but necessary to reproduce to provide context to his plea for an adjournment of two months for the main appeals:

> I wish to address this Honourable Court on my position in this appeal. I am the appellant, yet the same feels illusory. Over the past week, I have watched from the dock as my chances of success at this appeal slowly erode away. Not because of lack of merit but because I am not represented. While I note this Honourable Court's decision on barring the discharge of my lawyers the fact of the matter is I am unrepresented.
>
> I believe that there has never been a single occasion in Malaysian legal history where a counsel in a criminal trial or appeal has been prevented from discharging himself from representing his client in similar circumstances or any reasonable circumstances. Even the cases cited by Dato Sitham on Friday do not demonstrate this! In fact, the cases he presented to the court show in these cases there were continuing trend of multiple adjournments in the proceedings applied for by the accused/appellant before such drastic actions were taken by the court. *In our case, this is the first time I have changed solicitors/counsel for a good reason which I shall elaborate in a while. This is also the first time an adjournment of a mere 4 months is requested for, unlike other cases where adjournments of about 70 times were allowed by our courts*. At the end of this I wish to say something about what I have discovered from my casual understanding of the law in relation to the engagement of new counsel and circumstances posed that make it necessary for a request of an adjournment.
>
> I take responsibility of decisions pertaining to my representation. But I genuinely thought they were sound decisions at the time based on my solicitors and external counsel advice. Now it seems to be adversely interpreted against me by this Honourable Court if an appellant similarly placed in my position cannot rely on his lawyer's advice and being punished instead, fair trial and the rule of law seems to me illusory.
>
> Yet, and at no point have I been afforded the opportunity to explain myself nor have I been asked about the circumstances that led us here. *It is said that the accused is the most important person in the criminal court, yet I somehow feel mistreated and I feel fair trial has not been accorded to me*.
>
> *Yang Arif, I plead that no offence is taken for what I have said, but it is simply how I feel. As an accused and appellant at the final stage of a case, it is the worst feeling to have, to realise that the might of the judiciary machinery is pinned against me in the most unfair manner*.

...

With your permission Yang Arif.

My previous lawyers at Shafee & Co., did well over the past four years representing me in the High Court and the Court of Appeal, leaving no stones unturned, which is why they remain my lawyers in the other trials I am facing.

But notwithstanding their valiant effort, I lost in both my trial and the appeal to the Court of Appeal, not because my defence lacks merit. My previous lawyers and I seriously entertained the notion that even my defence would have not been called at the trial on all charges and therefore the reasons for the voluminous submissions by my counsel even at that stage.

It is with this backdrop I felt a fresh perspective of the case, and to bring in new ideas was warranted and necessary for my final appeal before this court as all and every valiant effort seems not to work. This after all involves my life, nothing less.

My initial plan was the engagement of Jonathan Laidlaw QC to come onboard with Shafee & Co. and to work with Tan Sri Shafee and Harvey. The QC came with the highest of recommendations and I was confident that he would be a positive contribution to the team. After all, Chambers and Partners, described him as a topmost silk in the UK and in most part of the commonwealth, in the field of criminal law particularly relating to fraud, corruption, abuse of powers and other corporate and white collared crime, for the last 4 years consecutively.

It is important to bear in mind here, the QC was prepared for the purposes of the hearing of this appeal starting on the last 15th August 2022. Fees for his services were paid. This should deliver the message to this court that I was serious with the appeal to go on the 15th.

...

Unfortunately, the High Court rejected the QC's bid to come onboard as my lawyer on the 21st July 2022. I was discouraged as this literally stopped the QC's preparation as the weeks of the appeal that he had reserved for the appeal would become wasted and he had to resort to adjusting his busy calendar.

With the High Court's rejection and this appeal fixed around the corner I could not run the risk of the QC's rejection being maintained at the appeal in the Federal Court leaving me with no additional counsel which by then I took the view was imperative to independently argue the issue regarding Justice Nazlan.

Datuk Zaid Ibrahim who had approached me some time back represented that he was able to bring in legal expertise from India through his Singaporean partner, a certain Mr Niru Pillai.

I had no knowledge of Datuk Zaid Ibrahim or his Singaporean partner of their expertise or otherwise in areas of criminal law, but I was then introduced by them to two senior counsel from India, who initially impressed me with their ides. Ultimately they suggested they will do the back end work while Datuk Zaid's firm would facilitate the court process.

Datuk Zaid and team came with a condition that their engagement must include his firm being placed as solicitors on record and a new local counsel to come onboard. I never knew that neither Zaid Ibrahim nor Niru Pillai has ever practiced criminal law or had sufficient knowledge on those subjects.

I was advised by Datuk Zaid and Mr Niru Pillai that this was the only way they would be afforded time to prepare for the appeal as by practice and precedent the court will (and this was represented to me in absolute terms) grant time for a new team to prepare. Acting on their legal advice, I agreed to this course of action.

I was not made known of the various legal propositions cited by this Honourable Court in the judgment recently pronounced the other day pertaining to the undue difficulties of change of counsel and the adjournment that would become necessary to enable the new counsel and solicitors to familiarise with the case.

I was also convinced that this was an appropriate decision after being told that other high-profile appeals in the past were granted multiple adjournments in the spirit of due process to achieve real justice.

... The SRC case has taken 4 years, two years of which were affected by the pandemic and no less than seven other proceedings, criminal and civil against me. *As I have said, I have also never sought for an adjournment in this appeal apart from the ones following my change of solicitors and counsel*.

I say in no uncertain terms – My intention was not to simply delay the court process but rather because of QC Jonathan Laidlaw's application not looking good based on the unreasonable and strong objections raised by the prosecution and the Bar Council, and ultimately the application being rejected less than a month before the scheduled dates at the gearing (sic) of the appeal. The objections taken by the prosecution and the Bar were so ridiculous that they argued that the QC must have Bahasa Malaysia qualification, a point settled by the Federal Court itself in Geoffrey Robertson QC, case. This point is important to show how these two bodies were all out to deprive me of a competent counsel before even I reach the Federal Court on the 15th of August. *Any new team bringing in fresh ideas will need time, to read the voluminous Record of Appeal, written submissions, applications etc*.

I am not ashamed to say, I was desperate, as would any litigant placed in my situation and predicament. I thought what I decided would increase my chances of improving the quality of submissions at the appeal.

Yang Arif, my decision has now left me with no counsel. While Tn Haji Hisyam came in with the most nobel (*sic*) of intentions, he cannot represent me effectively as he never had adequate time to prepare or read, and I consider him and the team of solicitors discharged as of August 18th, 2022 as it was made clear by Tn Haji on behalf of the team that they were not prepared to argue the appeals, in their state of total unpreparedness. *Seriously, Yang Arif, may I ask this Court, am I to be blamed and punished for relying on my own solicitors and counsel advice*.

Since, your decision last week, I have called up various counsel to find alternative representation, but considering the decision and grounds of this Honourable Court last Tuesday (16th August 2022), nobody is able or willing to take up my appeal, unless adequate time is given to that, as was being requested by Tn. Hj. Hisyam.

Even my previous counsel and solicitors are not able or willing to re-take the brief unless they are given adequate time of at least 2 months to re-mobilise their work considering the volume of preparation and other commitments to the courts. They can do this preparation in 2 months as they were involved at the High Court and the Court of Appeal. Tn Haji Hisyam on the other hand, together with his solicitors, being totally new to the case would require at least 4 months to get themselves ready and comfortable to argue the appeals.

This I must repeat leaves me with no counsel and I don't know what to do. If given time of at least 2 months, I am confident I can assemble a team to adequately represent me – perhaps with a combination of my previous counsel and Hj. Hisyam in a consolidated team. In that proposed combination perhaps Tn. Hj. Hisyam can be brought up to speed by Shafee & Co. to be able to understand the case within 2 months.

Yang Amat Arif, on Monday Tn Haji Hisyam said a hearing is like a contest. But right now it seems like I'm put out of the contest, a contest that affects my liberty. I feel this is not cricket at all as there is total unfairness executed on me.

In the normal course of events my counsel at this stage will be submitting copiously in my defence. But that is not the case today. I can't fault Tuan Haji for this and for him to just submit on a few points as suggested, would as I understand be a breach of another rule of practice where a defence counsel must present ALL legal defences available to him, surely not one or two points out of the 90 over grounds. My previous counsel Tan Sri Shafee and Harvey Singh had impressed upon me when preparing this appeal previously that there are at least 40 distinct grounds within the 90 grounds of the Petition of Appeal where my appeal on any single matter out of the 40 can be successful amounting to my acquittal in the appeal. *How can any responsible counsel resort to taking up only 2 or 3 points out of the 90 grounds and do justice to me. This Honourable Court seems overly concern about the time allotted for this appeal and that any adjournment would pose inconvenience to this Court and perhaps the Prosecution. But, Yang Arif surely, in the light of what I have said and what would be said later on, must justice be sacrificed at the altar of convenience*?

Therefore, I plead that time be given Yang Amat Arif. At this stage I am asking for two months for my counsel to be prepared and to conduct this appeal. I am already disadvantaged but at the least let me have my day in court with proper representation with the fullest of the argument of my defence without limitation.

The upshot of what I am asking is a mere 2 months postponement adjournment of the hearing of the appeal as opposed to my life and liberty being shortened by 12 years of imprisonment, not to mention the astronomical sum of the fine.

...

A With the help of some counsel I have discovered that there are many reported cases in the commonwealth from United Kingdom to Australia, Malaysia, India and Jamaica, South Africa, and from a non-commonwealth country in the United States, and my survey indicates that in my situation this Court should have given time to my counsel for adequate preparation in this very important appeal, which is noted by all
B the Court including the trial court as being the case that poses unusual issues and certainly great difficulties both in law and facts. In the old case, *Chong Fah Hin versus Public Prosecutor*, a 1949 decision by Justice Russell in Malaya, it was already decided that every accused person have a right to be defended by an advocate and should be given sufficient time to instruct his counsel.

C

I am disappointed with Your Ladyships and Your Lordships rulings that I am not entitled to an adjournment in order to provide effective defence through an effective counsel. Two of Your Ladyships decided in *Yahya Hussein Mohsen AbdulRab versus Public Prosecutor* that a flagrantly incompetent counsel does not amount to the right to a counsel of an
D accused person to be adequately satisfied. *Yang Arif, has directed my unprepared counsel to nevertheless submit, even on one or two points out of the 90 points, does not this tantamount to instructing an ineffective counsel to submit on matters affecting my liberty. And through no fault of my own! Is this the justice that the Highest Court of this land wants to deliver? Or am I just a pawn, as Geoffery Robertson QC said, "in a justice game".* (emphasis added)

E

[154] In his written submissions, the learned DPP contended that "If any injustice is suffered by the applicant, it is ultimately the applicant's own doing". At the oral hearing before us, he put it another way by saying that the applicant was "the author of his own misfortune". The *verbatim* text of
F his written argument on the point is reproduced below:

90. I submit that the Prosecution and Defence are expected to treat the trial dates as commitments to be honoured. The Court has the right to refuse an adjournment on the ground that it had no time to prepare the case.

G 91. The Applicant was complicit with his new Counsel in seeking an adjournment despite the hearing dates being fixed 4 months before the hearing of the Appeals.

92. It is obvious that the Applicant appointed his new solicitors/Counsel to seek an adjournment of the Appeals.

H 93. Thus, it is obvious that the solicitors/Counsel deliberately accepted the brief with the sole view of postponing a case that was fixed for 4 months earlier. This conduct of the solicitors/Counsel in accepting the brief with the sole intention to postpone the substantive appeals is contemptuous and an interference with the course of justice.

I 94. It is of utmost importance that defence Counsel who cannot fulfil the obligation to conduct the case without seeking an adjournment should not accept the brief.

95. The right to counsel does not encompass only the right to counsel of choice but counsel who is available to conduct the appeal hearing on the scheduled date.

96. The Respondent reiterates the Review Principles found in paragraphs 30.1 to 30.4 at pages 37-38 of this submission.

[155] There is no mistaking the allegation that the applicant had worked hands in glove with his lawyers to delay the hearing of the main appeals. I have dealt with the allegation earlier in this judgment and I shall not repeat it save to say that it is baseless.

[156] Looking objectively at the overall surrounding circumstances of the case, in particular the fact that the applicant was left to fend for himself after his counsel discharged himself, it is difficult not to agree with the applicant that he was not given a fair hearing by being denied a reasonable opportunity to prepare and to present his case before the court decided on the fate of his appeals, and his personal liberty. This is elementary rule of natural justice, a breach of which would warrant a review under r. 137 of the Rules (*Dato' See Teow Chuan & Ors* (*supra*) at [10]).

[157] There is merit in the applicant's contention that even if the court was not minded to give a full three to four months adjournment that Hj Hisyam asked for, it could at the very least grant a shorter period, but not the mere three days that it granted to counsel for him to file his written submissions for the main appeals which involved volumes of documents containing some 30,000 pages of material for each appeal to go through. The combined judgments of the High Court and the Court of Appeal alone consisted of some 1,000 pages.

[158] Given the precarious situation that he was in after the court refused to grant an adjournment of the main appeals followed by his lawyer's decision to discharge himself, it is understandable why the applicant was alarmed by the court's decision to go ahead with the hearing of the main appeals on 23 August 2022 and to decide thereon when he had no legal representation. He could not understand the speed at which the court wanted to complete the hearing of the main appeals and to deliver its verdict without giving his newly appointed counsel sufficient time to prepare.

[159] The issue is not so much a denial of the applicant's right to counsel of his choice, for he was never denied that right. The issue is whether it was fair in the circumstances to deny his counsel, who had just been appointed barely three weeks earlier, an adjournment of three to four months, or two months (as requested by the applicant personally), or a shorter period to prepare for the main appeals.

[160] In *R v. Thames Magistrates' Court*, *ex parte Polemis* [1972] 2 All ER 1219 at p. 1225 Lord Widgery CJ in explaining the rationale for his decision to quash the accused's conviction when an adjournment was refused by the court said:

A I come back now to the four lay justices who refused the adjournment. As I have already said, I have not the slightest doubt that what was in their minds was that if they adjourned the case, it was equivalent to forgetting all about it and saying goodbye to the applicant and to any fine which might be imposed. I think they weighed the considerations for and against conducting the enquiry
B that afternoon and came to the view that the considerations in favour of conducting it prevailed. *I think they were wrong in that approach. I think they should have asked themselves first, whether the enquiry could be conducted having due regard to the rules of natural justice that afternoon and if the answer was No, then that would be the end of the*
C *matter; they would then have to make up their minds that they were not going to conduct that enquiry that enquiry that afternoon at all*. Of course it would then be for their consideration as to what steps could properly be taken to make sure that the captain, the fine and all trace of the affair did not slip away with the tide. But they would have no difficulty within the powers open to them in taking
D appropriate steps to that end. One bears in mind to start with that they had the power to remand the captain in custody, which would most effectively ensure that he was still available for disposal on the adjourned hearing date. One does not imagine that in practice such an extreme course would be necessary, but the possibility of that being available as a last resort would no doubt stimulate the
E shipowners in cases of this kind to make some useful alternative suggestion, either by the provision of sureties for bail, or the deposit of a sum of money for any potential fine or otherwise. Indeed on that hurried day, 11 July 1973, the solicitors for the applicant did make an attempt to provide some kind of security of that sort. *The practical answer, as I see it, is that if the court cannot conduct*
F *a trial in accordance with the rules of natural justice before the ship sails, then the justices must adjourn the matter because the rules of natural justice are paramount*, but they have adequate powers to see that some sensible provision is made whereby there would be some security for the appropriate penalty in the event of a subsequent conviction.

G So far as this court today is concerned, all that I need to say is that in my opinion *certiorari* should go to quash the conviction.

(emphasis added)

[161] By parity of reasoning, since it was not possible for the earlier panel to conduct the main appeals in accordance with the rules of natural justice
H due to the fact that the applicant's counsel had discharged himself, thus leaving the applicant stranded without legal representation to argue the appeals, it should have adjourned the hearing of the main appeals "because the rules of natural justice are paramount". As a matter of fact this was precisely the reason why the court directed Hj Hisyam to remain in court as
I counsel for the applicant after he had discharged himself - to ensure that the applicant was legally represented, on record.

[162] The decision of the High Court in *Awaluddin Suratman & Ors v. PP* [1991] 3 CLJ 2459; [1991] 2 CLJ (Rep) 310; [1992] 1 MLJ 416 is on point. Mohtar Abdullah J (later FCJ) in setting aside the conviction and ordering for a retrial said on review:

> Though the court should be strict in dealing with applications for postponements, the court owes a duty, too, *to an accused person to ensure that he has the benefit of counsel who would be properly able to act on his behalf.* (emphasis added)

[163] The learned DPP urged upon us not to countenance the last-minute application for adjournment by the applicant as it will open the floodgates for similar applications in the future. The applicant's response was to refer to the Federal Court decision in *Yahya Hussein Mohsen Abdulrab v. PP* [2021] 9 CLJ 414; [2021] 5 MLJ 811 where at paras. [60] to [62] the court dealt with the floodgates issue as follows:

> [60] This brings us to the floodgates point. Learned DPP argued that if we were to accept the argument that convictions can be nullified because of defence counsel's flagrant incompetence, accused persons could purposely appoint incompetent lawyers to have their convictions overturned on appeal by virtue of such incompetency. The Court of Appeal seemed to accept this argument because it reiterated the same policy concern in its grounds of judgment at para. 53, as follows:
>
> > [53] ... If this order is made instead, it would be far too easy for an accused to be acquitted and discharge (*sic*), *ie*, just by engaging counsels (*sic*) who would by design not handle the case properly and with certain standard (*sic*) expected in defending an accused person.
>
> [61] With respect to the Court of Appeal and learned DPP, we find ourselves constrained to reject this assertion. The first reason has to do with the importance of a right to a fair trial that we have alluded to above. **The prosecution's case is not the primary feature as the overall process must be fair. Otherwise, it cannot be said that the accused was deprived of his life or personal liberty in accordance with law**.
>
> [62] Further, the assertion that an accused person would by design engaged an incompetent counsel to secure an acquittal defies common sense and is itself utterly devoid of any logic. We cannot imagine a case in which any lawyer would be willing to sacrifice his own reputation and credibility at the Bar or before the Bench to deliberately be incompetent in defending his client. We also cannot imagine any accused person agreeing to a strategy of sacrificing his counsel by calling him incompetent with the aim of having another set of counsel working to acquit him on that point alone. The ramifications of even thinking about such a strategy is that the accused will have to languish in prison pending the hearing of his appeal, incur significant expenses in retaining new counsel to conduct the appeal or even run the risk of jeopardising his own defence or evidence during the trial process. In any case, the threshold to prove a

breach of fair trial requires not just incompetency but flagrant incompetency which is a high threshold and so the number of cases in which convictions can be overturned on this ground will be sparse.

[164] It was a case on incompetency of lawyers and not on adjournment but it provides a complete answer to the floodgates point raised by the prosecution. To recapitulate and to give a more complete picture as to how the applicant's main appeals ended the way it did, it will help, at the risk of some repetition, if the chronology of events starting from the case management days up to the day Hj Hisyam discharged himself on 18 August 2022 is set out. The record of appeal shows the following train of events, starting from 25 January 2022.

25 January 2022

During the case management (CM), parties were informed that the hearing of the appeals would be fixed on dates as early as March 2022, *ie*, within two months of the CM. Counsel for the applicant TS Shafee informed the Registrar that March 2022 was too short a time for them to prepare for the case, for the following reasons:

(a) the decision of the Court of Appeal was only delivered on 8 December 2021 (eight months after the completion of the hearing of the appeal). The Court of Appeal took eight months to come up with its decision due to the complexity of the issues involved;

(b) parties had yet to receive from the Registry the full record of appeal. The record of appeal and the notes of proceedings would be voluminous and the judgment of the Court of Appeal was lengthy, running into more than 300 pages and the judgment of the High Court running into more than 700 pages;

(c) since the record of appeal had yet to be provided, the applicant was unable to prepare a complete petition of appeal as there was a need to go through the complete record of appeal. This had to be undertaken due to the shift in certain areas of the Court of Appeal judgment from the High Court judgment. There was also a possibility that there would be a request for extension of time to file a complete and comprehensive petition of appeal;

(d) the applicant needed additional time to go through the voluminous record of appeal. The extension of time was requested for and granted by the Court of Appeal;

(e) during the CM, TS Shafee informed the Registrar of the applicant's intention to engage a QC in the person of Mr Jonathan Laidlaw since the appeals involved complex issues and questions of law which are considered novel in Malaysia and in the Commonwealth. Hence, the applicant required time after receiving the record of appeal to supply the same to the QC in London. Moreover, many notes and documents were in the Malay language and needed to be translated into English for TS Shafee and the other counsel to brief the QC;

(f) fixing an early date for the hearing of the appeal would be greatly prejudicial to the applicant considering the fact that this was his final appeal. The applicant felt that his appeal was being rushed for no good reason;

(g) fresh and additional evidence in relation to the controversies of Tan Sri Zeti Aziz and Tan Sri Nor Mohd Yakcop and Nik Faisal Kamil were also before the Federal Court. If the Federal Court were to allow the additional fresh evidence, an extended procedure of reception of the evidence would ensue, which would change the landscape of the appeals. Fixing the hearing date of the substantive appeals without hearing the appeal for the fresh evidence might deliver a wrong adverse message to the applicant and the general public.

8 April 2022

Following the CM on 8 April 2022, the applicant's counsel contacted the QC to inform him that the tentative date for the hearing of the appeals would be on 1 August 2022 to 12 August 2022. The QC took note of the proposed dates but informed that the free dates for his team to appear in Malaysia would be in the last two weeks of August 2022 beginning from 15 August 2022.

26 July 2022

Letter from the applicant's counsel to the Federal Court Registry on notice of discharge of Shafee & Co as counsel and solicitors for the applicant. The letter was issued by Messrs ZIST, who informed the Registry that at the next CM, their instruction was to withdraw the pending appeal against the decision of the High Court to dismiss the applicant's application for an *ad hoc* admission of QC Jonathan Laidlaw. They were also instructed to address the court on their application for adjournment of the hearing of the Notice of Motion filed on 7 June 2022 as well as the main appeals fixed for hearing on 15 August 2022 to 26 August 2022, on the basis that *a wholly new team of solicitors had just taken over conduct of the case*.

28 July 2022

Affidavit of the applicant was filed to confirm that he had discharged Messrs Shafee & Co from acting further for him as solicitors and counsel and that Messrs ZIST would take over as his solicitors with Hj Hisyam as lead counsel. The court took note of the appointment of Messrs ZIST as the new solicitors for the applicant.

29 July 2022

Parties were told that the hearing of the appeals fixed on 15 August 2022 to 19 August 2022 and from 22 August 2022 to 26 August 2022 *would not be postponed and that parties must be ready for the hearing*.

1 August 2022

At the CM, the Deputy Registrar informed parties that the applicant's Notice of Motion to adduce fresh evidence and the application to amend the Notice of Motion together with the appeals were all fixed for hearing on 15 August 2022 to 26 August 2022 (the dates fixed for the hearing of the appeals). The Registry was informed by Messrs ZIST that although lead counsel Hj Hisyam would be proceeding with the motion to adduce fresh evidence as well as the application to amend the motion, *they would be applying to the court for an adjournment of the hearing of the main appeals after the hearing of the motion*. The following reasons were given:

(1) They only took over as solicitors and counsel for the applicant on 26 July 2022 and that by any standard, this was a highly complicated appeal with multiple complex issues of fact and law, which required very substantial time and effort on their part.

(2) The complexity and the monumental task of preparing for the main appeals was manifest and is demonstrated by the extremely voluminous documents, which ran into at least 162 volumes. It was estimated that there were *about 30,000 pages of documents in respect of each appeal*. It was therefore humanly impossible to meaningfully review and digest the documents to be able to formulate their substantive arguments for the main appeals.

(3) This was a *bona fide* and genuine request by the new team of lawyers for an adjournment of the main appeals, to enable them to present a full, proper and comprehensive submissions to assist the court.

(4) Any lesser preparation would not only do injustice to the applicant in that it would have grave and far-reaching consequences and implications for him, but would also not be of any assistance to the court.

(5) As officers of the court, both lead counsel Hj Hisyam and Messrs ZIST owed a duty to assist the court to do justice on the case which had drawn considerable public interest. This was quite apart from counsel's duty to the applicant to ensure that he received a full and fair hearing in this final stage of the legal proceedings involving the SRC matter.

2 August 2022

Letter from the Registry to Messrs ZIST informing the firm that the hearing of the main appeals would proceed right after the hearing of the two notices of motion. Messrs ZIST was informed that if the notices of motion were allowed, the hearing would be adjourned pending the admission of the additional evidence, *but if the notices of motion were not allowed, the hearing of the main appeals would proceed on the same day and no adjournment would be allowed*.

16 August 2022

The motion to adduce additional evidence was heard and dismissed and parties were instructed to proceed with the substantive merits of the main appeals. Hj Hisyam told the court that he and his team, being the new lawyers for the applicant, were not prepared to argue the main appeals and moved the court to adjourn the appeals for three - four months. The application for adjournment was refused on the ground that unpreparedness of counsel to argue the case could not be accepted as a valid reason for granting an adjournment. Nevertheless the court allowed a two-day adjournment of the hearing to 18 August 2022 to allow Hj Hisyam and his team to "organize themselves" and to make use of the weekend to prepare "on any of the 94 grounds in the Petition of Appeal" and to submit on the same at the next hearing date on 23 August 2022 (Tuesday, the Monday 22 August 22 having been vacated by the court itself and taken off).

18 August 2022

Hj Hisyam made a fresh request for the appeals to be adjourned on the same ground that he and his team were not prepared to argue the appeals. *The request for adjournment was rejected by the court. With his application for adjournment refused, Hj Hisyam discharged himself from acting as counsel for the applicant*. This was also refused for the reason that it would leave the applicant without legal representation. The court then invited Hj Hisyam to submit on the main appeals but counsel stood his ground that he was not making any submission for want of preparation. *Despite the stand taken by counsel, the court told him to remain in court as counsel on record for the applicant, after which the court proceeded to hear the appeals without the participation of the applicant*. (emphasis added)

[165] The immediate effect of Hj Hisyam's decision to discharge himself from acting as counsel for the applicant was to leave the applicant without legal representation to face the prosecution at the hearing of the appeals. The consequence was that for a full two days he was practically forced to listen to the learned DPP telling the court that there was ample evidence against him to justify his convictions and sentence.

[166] On the facts and the law applicable, there is only one conclusion that I can arrive at, and that is, the refusal by the court to grant an adjournment of the main appeals had defeated altogether the applicant's right to be represented by an effective counsel. This warrants a setting aside of the decision by way of review under r. 137 of the Rules for the reason that it has caused injustice to the applicant for which he had no other effective remedy.

[167] I now come to the issue of the court's refusal to allow Hj Hisyam to discharge himself from representing the applicant. It will be recalled that in not allowing Hj Hisyam to discharge himself, the court, in exercising its

inherent jurisdiction, ruled that leave must first be obtained before counsel could do so. The question is whether the court in a criminal matter had jurisdiction to stop him from discharging himself without leave of the court.

[168] The applicant's contention was that the court went against the Registrar's Circular No. 6 of 1960 ("the 1960 circular") in preventing Hj Hisyam from discharging himself. The 1960 circular is still in force and the notification of its enforceability can be accessed online at www.kehakiman.gov.my. It was addressed to "All Presidents, Sessions Courts. All Circuit Magistrates" and carbon copied to "All Senior/Assistant Registrars, Supreme Court. All secretaries to judges" and reads as follows:

> Some recent cases in the Lower Courts of defence counsel applying to the Court during the course of the trial for permission to withdraw from the case have been brought to the notice of the Chief Justice. *His Lordship has directed me to inform you that the correct reply in such cases is that there is no question of any leave of the Court being necessary. It is purely a private matter between counsel and his client. The Court has no power to compel a counsel to continue with a case if he does not wish to do so.*
>
> 2. I am to add that where any correspondences has been wrongly or inadvisably sent to the Court in relation to any pending case, the Court should refrain from expressing any opinion on such correspondence until the hearing of the case is concluded. (emphasis added)

[169] The learned DPP submitted that the 1960 circular does not apply to the Federal Court as it was only meant to be complied with by the subordinate courts, namely the Magistrates' Court and the Sessions Court as it was addressed to them and not to judges of the superior courts.

[170] The applicant on the other hand argued, on the authority of *Lumley v. Wagner* [1843-60] All ER Rep 368; (1952) 1 De GM & G 604; 42 ER 687; 91 RR, which was adopted and applied by the Federal Court in *Pertama Cabaret Nite Club Sdn Bhd v. Roman Tam* [1981] 1 LNS 235; [1981] 1 MLJ 149, that the court had no jurisdiction to prevent Hj Hisyam from discharging himself. The headnote to *Lumley v. Wagner* reads as follows:

> The court will grant an injunction to restrain the breach of the negative part of the contract even though *it cannot specifically enforce the performance of the positive part of the contract, eg, where the positive part is an undertaking to render personal services, and the effect of the injunction is to compel the specific performance of the contract as a whole.* (emphasis added)

[171] By its adoption by the Federal Court in *Pertama Cabaret*, *Lumley v. Wagner* has become part of our law. Under the Federal Constitution law includes the common law. On the strength of this authority, it was submitted that the order by the court to prevent Hj Hisyam from discharging himself was unlawful as it had the effect of compelling specific performance of his contract with the applicant. Thus, even without the 1960 circular, the

common law does not allow the court to stop counsel from discharging himself from representing his client. It is a private matter between counsel and his client. The reasoning behind the 1960 circular conforms with the decision in *Lumley v. Wagner*.

[172] It will be a strange working of the law and an anomaly if the directive is to apply only to the subordinate courts but not to the superior courts when we all know that lawyers appear in both the subordinate and superior courts. That can lead to chaos in the administration of justice. With due respect to the learned DPP that cannot be the intention behind the 1960 circular, which has not been amended or modified.

[173] I am in agreement with the applicant on this point. With the greatest of respect, the earlier panel was wrong in preventing Hj Hisyam from discharging himself from acting as counsel for the applicant. Therefore in law, the applicant had no legal representation when his appeal was heard and dismissed on 23 August 2022. As decided by the Federal Court in *Asean Security Paper Mills Sdn Bhd* (*supra* at [7]), a clear infringement of the law is a ground for review under r. 137 of the Rules.

[174] For all the reasons aforesaid, I allow the application in Motion No. 2. As for the consequential order to be made, the proper order in my view would be an order of acquittal and discharge for all the offences that the applicant was charged with. It appears clear that there has been a miscarriage of justice in that the applicant was deprived of a fair hearing. In *Sankar v. The State* [1994] UKPC 1, the incompetence of the accused's counsel had deprived him of a fair trial. An acquittal was ordered and not a retrial. Lord Woolf in delivering the judgment of the Privy Council said:

> In an extreme situation where the defendant is deprived of a fair trial then even though it is his own advocate who is responsible for what has happened, an appellate court may have to quash the conviction **and will do so if it appears there has been a miscarriage of justice**.
>
> (emphasis added)

[175] His Lordship was speaking in the context of the power of an appellate court (the Court of Appeal of Trinidad and Tobago) hearing an appeal from the decision of the trial court but I see no valid reason in law why it should not apply to an application for review under r. 137 of the Rules as the whole purpose behind the rule is to prevent injustice to any person who is left with no other effective remedy.

[176] As a footnote, I just wish to say that I take no pride nor pleasure in dissenting from the majority. But illusory though it may be from a minority point of view, justice must not only be done but must manifestly be seen to be done though the heavens may fall.